DOCUMENT RESUME

ED 288 456 HE 020 952

AUTHOR	Douglas, Joel M., Ed.
TITLE	The Faculty Life Cycle: A Legal Perspective. Proceedings of the Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions (15th, New York, New York, May 1987).
INSTITUTION	City Univ. of New York, N.Y. Bernard Baruch Coll. National Center for the Study of Collective Bargaining in Higher Education and the Professions.
REPORT NO	ISBN-0-911259-22-8
PUB DATE	May 87
NOTE	131p.
AVAILABLE FROM	National Center for the Study of Collective Bargaining, Baruch College, CUNY, 17 Lexington Avenue, Box 322, New York, NY 10010 ($20.00).
PUB TYPE	Collected Works - Conference Proceedings (021) -- Viewpoints (120) -- Reports - Descriptive (141)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Affirmative Action; Career Ladders; Collective Bargaining; *College Faculty; Comparable Worth; Court Litigation; Employment Opportunities; *Employment Practices; Faculty Development; Higher Education; Legal Responsibility; Personnel Policy; Privacy; Salary Wage Differentials; Sexual Harassment; Teacher Recruitment; *Teacher Retirement; *Teacher Salaries; *Teacher Strikes; *Tenure
IDENTIFIERS	American Association of University Professors; Bellevue Community College WA; Canada; College Retirement Equities Fund; Fairleigh Dickinson University NJ; Illinois (Chicago); Massachusetts; Syracuse University NY; *Teachers Insurance and Annuity Association; Temple University PA

ABSTRACT

The life cycle of a faculty member from pre-employment through retirement is examined in these proceedings. Paper titles and authors are as follows: "The Role of Faculty in Obtaining Quality in Higher Education: Facing the New Realities" (Frank Newman); "The American Professoriate: Rewards and Satisfactions" (Eugene Rice); "Institutional Renewal through Faculty Development: Syracuse University's Program" (John Centra); "Collective Bargaining by Professional Employees" (David Rabban); "Professionals in Work Organizations" (Donald Vredenburgh); "Institutional Employment Practices Pertaining to Sexual Harassment" (Caesar Naples); "Institutional Employment Practices Pertaining to Affirmative Action" (Ira Bloom); "Institutional Employment Practices Pertaining to Issues of Privacy" (Joan Van Tol); "Preferential Treatment in Faculty Career Opportunities: A Legal Analysis" (Marcia Cohen); "Affirmative Action in Faculty Recruiting and Hiring: The Temple University Experience" (Conrad Jones); "Merit, Market, and Comparable Worth at the University Level" (Gerie Bledsoe); "Discrimination in Compensation: Current Status of the Case Law" (John Donoghue); "Canadian Faculty Compensation Experience" (Robert Rodger); "A Legal Analysis of the Tenure Issue: An AAUP Perspective"

(Ralph Brown); "A Legal Analysis of the Tenure Issue: A PSC Perspective" (Nicholas Russo); "Legal Issues in Tenure in the Massachusetts Community College System" (Carolyn Young); "Issues in Tenuring: A Faculty Union Leader" (Josephine Reiter); "Academics on Strike: The Chicago City Colleges Experience--A Faculty Perspective" (Norman Swenson); "Academics on Strike: The Fairleigh Dickinson Experience--A Faculty Perspective" (Thomas McDonald); "Academics on Strike: The Bellevue Community College Experience--A Faculty Perspective" (Carol Mandt); "TIAA/CREF's Faculty Pension Plans" (Larry Hershberger); "Alternatives to TIAA/CREF Retirement Plans" (Roy Schotland); and "The Commission on College Retirement's Approach on Pension Plans" (Thomas Woodruff). (SW)

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THE FACULTY LIFE CYCLE: *A LEGAL PERSPECTIVE*

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Proceedings
Fifteenth Annual Conference
May 1987

JOEL M. DOUGLAS, Editor

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National Center for the Study of Collective
Bargaining in Higher Education and the
Professions—Baruch College, CUNY

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Baruch College, City University of New York

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Price $20.00

ISSN 0742 - 3667
ISBN 0-911259-22-8

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INTRODUCTION

The suggestion was somewhat intriguing; for our central theme for the upcoming Fifteenth Annual Conference, why don't we look at the life cycle of a faculty member from pre-employment through retirement. This topic was developed by our planning committee and consistent with our mandate, we superimposed this question on the unionized university as the foundation for our conference. With the ever increasing "lawyerization" of collective bargaining in higher education, we also decided to include attorneys at each of our sessions in order to ensure that the audience would be kept abreast of current case law. Approximately, one-half of our speakers were attorneys with substantial experience in faculty bargaining. Thus, the framework was set to examine the life cycle from both a legal and personnel perspective.

DESIGN OF THE CONFERENCE

We invited academics from the disciplines of sociology and education to present the first plenary session. Our focus was on the vitality of the professor and ways to ensure his/her continued development and renewal. Gene Rice of the University of the Pacific delivered the opening paper based on his research, "Faculty Lives: Vitality and Change". John Centra from Syracuse and Dean Whitla from Harvard addressed the issue of faculty development from both a programmatic and methodological viewpoint. Having addressed the vitality question, we next embarked on a legal/sociological perspective with the world in which professionals work. David Rabban, a former AAUP attorney and currently a professor of law at the University of Texas, addressed the legal and legislative framework under which professionals bargain. In addition to the academics, about which so much has been written, Rabban endeavored to link and bridge professionals in the broader sense with emphasis on their employment relationships. Frank Newman from the Education Commission of the States was our luncheon speaker. A former university president and author of numerous education reports, Newman addressed the new realities confronting faculty and their role in the drive to achieve quality education.

We began the life cycle portion of the program by addressing some of the most difficult legal issues in the field of personnel today. Institutional employment practices with respect to employment discrimination, protected disabilities and due process rights were analyzed. Caesar Naples of California State University, Ira Bloom from The City University of New York and Joan Van Tol from the National Association of College and University Attorneys set forth the current case law with respect to each of these issues. While this session concentrated primarily on employment practices, the panelists addressed themselves to the ever increasing role of the judiciary as final arbiter within the employment relationship.

Step One of the cycle, recruiting and hiring the professor, was examined through the prism of affirmative action and equal employment. Marcia Cohen presented a legal approach to what the employer's obligations are concerning affirmative action, while Conrad Jones of Temple University discussed the experience at that institution concerning minority faculty recruitment. The nuances of paying the professor, Step Two, was discussed by Gerie Bledsoe, an academic unionist of the NEA, and Robert Rodger, a psychologist at Dalhausie University. Bledsoe set forth current trends within compensation plans in American universities and colleges, while Rodger did the same for Canadian institutions. John Donoghue examined legal approaches of compensation and the role of recent federal legislation.

The third step of the life cycle concerned the tenuring process. Three attorneys analyzed legal issues of concern to the professoriate. Ralph Brown of

Yale focused on the AAUP guidelines, while Nick Russo of the PSC and Carolyn Young of the Massachusetts Regional Community College System presented the advocates perspective. Assuming the success of the academic career, we then addressed the final issue of faculty retirement. In this, the fourth stage of the life cycle, Larry Hershberger from TIAA/CREF, presented an overview of the new approaches in the retirement industry, while Roy Schotland of Georgetown University and Thomas Woodruff from the Commission on College Retirement set forth their thinking and legal perspectives on this issue.

Although not considered part of the life cycle, the question of faculty on strike was examined by three academic unionists, all of whom have been involved in work stoppages in universities and colleges. Norman Swenson from the Chicago City Colleges, Tom McDonald of Fairleigh Dickinson and Carol Mandt of Bellevue Community College described their experiences they encountered while walking the picket lines.

Each of the sessions had experienced academics serving in the role as moderators and/or discussants. As has happened so often in the past, the role of moderator at a NCSCBHEP Conference is far more than procedural for they also serve as reactors as well as convenors of the program. This year's group represented both management and labor, as well as academics and neutrals. Margaret Chandler of Columbia University, Don Vredenburgh of Baruch, Tom Mannix from SUNY, Adrienne Leinwand from Baruch, Howard Jones from Manhattan Community College, Josephine Reiter from Framingham State College and Samuel Ranhand of Baruch all admirably served in this capacity.

THE PROGRAM

Set forth below is the program of the Fifteenth Annual Conference. Some editorial liberty was taken with respect to format and background material in order to ensure readability and consistency. In those instances where the author was unable to submit a paper, while the name appears on the program, the remarks have been omitted.

MONDAY MORNING, MAY 4, 1987

8:30 REGISTRATION AND COFFEE HOUR

9:30 WELCOME
Paul LeClerc, Provost, Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1987
Joel M. Douglas, Director, NCSCBHEP

10:15 PLENARY SESSION "A"
THE PROFESSORIATE: VITALITY, DEVELOPMENT AND RENEWAL

Speakers:
R. Eugene Rice, Professor and Chair
Department of Sociology
University of the Pacific

John Centra, Professor and Chair
Higher Education Program
Syracuse University

Dean Whitla, Professor of Education
Director of the Danforth Center for
Teaching and Learning, Harvard Univ.

Moderator: Margaret Chandler, Professor
Graduate School of Business
Columbia University

11:30 PLENARY SESSION "B"
PROFESSIONALS AND THE WORLD OF WORK

Speakers: David M. Rabban, Professor of Law
Univ. of Texan, American Bar Assn.
Visiting Scholar

Eliot Freidson, Professor of Sociology
New York University

Moderator/Discussant: Donald Vredenburgh, Prof. of Mgmt
and Associate Provost, Baruch College
CUNY

1:00 LUNCHEON

Topic: THE FACULTY AND QUALITY IN HIGHER
EDUCATION: FACING THE NEW REALITIES

Speaker: Frank Newman, President
Education Commission of the States

Presiding: Frederick Lane, Professor of Public
Administration, Baruch College, CUNY

MONDAY AFTERNOON, MAY 4, 1987

2:30 PLENARY SESSION "C"
INSTITUTIONAL EMPLOYMENT PRACTICES

Speakers: Caesar J. Naples, Vice Chancellor
of Faculty and Staff Relations
California State University

Ira Bloom, Vice Chancellor
for Faculty and Staff Relations
City University of New York

Joan Van Tol, Asst. Exec. Director
National Assn. of College and
University Attorneys

Moderator: Thomas Mannix, Associate Vice
Chancellor for Employee Rels. &
Personnel, State Univ. of New York

TUESDAY MORNING, MAY 5, 1987

9:30 LIFE CYCLE — STEP ONE: RECRUITING AND
HIRING THE PROFESSOR

Speakers:

Joan A. Carpenter, Vice Pres. for
Human Resources/Affirmative Action
Officer, Syracuse University

Marcia S. Cohen, Esq.
Chamblee & Miles, P.C.
Tampa, Florida

Conrad D. Jones, Asst. to the Pres.
& Director of Local Government Affairs
Temple University

Moderator:

Adrienne S. Leinwand, Exec. Asst.
to the President, Baruch College
Affirmative Action Coordinator

9:30 LIFE CYCLE — STEP TWO: PAYING THE PROFESSOR

Speakers:

Gerie Bledsoe
Coordinator of Higher Education
National Education Association

John M. Donoghue, Esq.
Plunkett & Jaffe, P.C.
White Plains, New York

Robert S. Rodger, Dean and Prof.
of Psychology, Dalhausie University
Co-Chair, Parity Committee/CAUT

Moderator:

Howard L. Jones, Professor
Physical Education, Borough of
Manhattan Community College, CUNY
First Vice President, PSC/AFT

11:15 LIFE CYCLE — STEP THREE: TENURING THE PROFESSOR

Speakers:

Ralph S. Brown, Esq.
Simeon E. Baldwin Professor
Emeritus of Law, Yale University

D. Nicholas Russo, Esq.
Director of Legal Affairs
PSC/AFT

Carolyn R. Young, Esq.
Associate Counsel, Massachusetts
Regional Community College System

Moderator/Discussant:

Josephine Reiter, Prof. of Music
Framingham State College
Chapter President, MSCA/NEA

11:15 LIFE CYCLE: AT ANY TIME FACULTY ON STRIKE:
IT COULD HAPPEN TO YOU

Speakers:	Norman G. Swenson, Prof. of Business Administration, Chicago City Colleges President, Cook County College Teachers Union/AFT
	R. Thomas McDonald, Assoc. Prof. of History, Fairleigh Dickinson Univ. President, AAUP Chapter
	Carol Mandt, Counselor/Instructor of Human Development, Bellevue Community College, BCCAHE Fac. President/NEA
Moderator:	Samuel Ranhand, Professor Emeritus of Management, Baruch College, CUNY Arbitrator

TUESDAY AFTERNOON, MAY 5, 1987

1:00 LUNCHEON SYMPOSIUM

Topic: LIFE CYCLE — STEP FOUR: RETIRING THE PROFESSOR

Speakers:	Thomas Woodruff, President Commission on College Retirement
	Roy Schotland, Professor of Law Georgetown University Law Center
	Larry Hershberger Senior Vice President TIAA/CREF
Presiding:	Joel M. Douglas

3:30 SUMMATION AND ADJOURNMENT
Joel M. Douglas

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U. S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.

- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.

- An annual bibliography, Collective Bargaining in Higher Education and the Professions.

- The National Center Newsletter, issued five times a year providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs — complete coverage of a major problem or area, sometimes of book length.

- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

The Proceedings of the Fifteenth Annual Conference is part of the ongoing publication series of the Center. While many of us have had a role in its preparation, several individuals played a major role in both in ensuring the success of the conference and the preparation of this volume. Those who served as part of the production team of this volume are aknowledged below.

Ruby N. Hill operated our word processing system and ensured the high quality production level of this project. Beth Hillman coordinated all aspects of not only this publication but the conference itself. Beth also assisted me with copy editing and all proof reading. Steven Bryan and Farida Krane, two researchers at the Center, worked with us at the conference, while Beth Cohen and Jasmine Tata, also Center researchers, subsequently served as active proofreaders. Jeannine Granger did a thorough job of transcribing speeches from audio tapes. The production of this Proceedings volume was truly a collaborative effort. As they have done so often in the past, the Center's staff performed admirably. As I have stated on previous occasions, for any errors or omissions, we apologize. For the success of this project, we gratefully acknowledge the above.

J. M. D.

I. THE PROFESSORIATE: VITALITY, DEVELOPMENT AND RENEWAL

A. THE ROLE OF FACULTY IN OBTAINING QUALITY IN HIGHER EDUCATION: FACING THE NEW REALITIES

Frank Newman
President
Education Commission of the States

INTRODUCTION

I would like to focus on quality and I mean by that particularly the question of undergraduate quality. There are two reasons why we ought to be focusing on that question: One is a question that deals with public need, the questions facing the United States of America in its current setting. What does it need from us, the guardians of undergraduate education? The second is that any enterprise including ours needs to be going somewhere in order to do things well.

The whole question of the quality of higher education has come up much more frequently lately. Some of the causes for this new attention are that there has been a good deal of criticism. The governors and the state legislators have been outspoken on some of this. I would like to come back to those criticisms, many of which are terribly important. This is a period when, for the first time in quite a while, higher education is being criticized on quality grounds. Part of this is attributable to the current Secretary of Education, who has pointed out a number of our shortcomings with, as one of his people put it to me the other day, "a lively style". Some of his criticisms are based on telling points. If any of you are readers of the Washington Post, you perhaps saw an article called, "Are Our Colleges Dying?" It is by an academic from New York, Herbert London, who is a dean at New York University. Let me give you a couple of quick quotes, for what he has done is pick up a number of the criticisms that are going around.

> I am convinced that the university as an institution cannot survive. The end of the university is inevitable. Closed minds on the campus ultimately will close colleges because of the narrowness of our thinking. Lowered academic standards and flagging faculty morale, diminishing intellectual life and colleges overburdened with remedial course work and festering intolerance for open discussion of issues...

He goes on to quote Ernie Boyer's comment that:

> ...the undergraduate college, the very heart of higher

> learning is a troubled institution. It goes on scrambling for students and driven by market place demands, and many undergraduate colleges are confused about their mission. Tuition increases that have tripled the inflation rate for each of the past four years put costs beyond it. The federal government is unwilling to subsidize education as thoroughly...

Here are a couple more quotes:

> With the decline in the birth rate there will not be enough adolescents by the year 2000 to sustain the present number of universities and colleges. Many colleges have standards that are roughly equivalent to what a high school had three years ago.

Then he goes on and quotes Bennett as claiming that colleges are "charging too much and delivering too little". He talks about the corporate colleges that are on the rise. He talks about the fact that the "curriculum has nothing to do with the vision about what students should learn", and he talks about "a devastating public devaluation of a college education".

When there are criticisms there is usually something behind it. As a matter of fact there is a commission, on which I've been asked to serve, created by the universities and colleges to address these very questions. How legitimate are these complaints, and most importantly, what is it that colleges and universities should be doing to respond appropriately to this? Well, I think a part of that is to ask what the legitimate questions are. There are a series of them, and I want to try out on you what I think are some of the answers.

Some of them are critical, but beyond today's discussion. For example, why should the costs of attending college be rising at double the rate of inflation? Mr. London argues it has tripled, but, in fact, in recent years, it has doubled. But double or triple, the issue is still the same. Why is it that it is going up so rapidly and, if there are rational reasons for that, is it not in the interests of colleges to make them plain so that there is no criticism? Secretary Bennett has argued that there is a reason, that it is because of too much federal aid. The data shows exactly the reverse. When there has been high federal aid, the cost increases have slowed and been behind inflation, and now during a period of declining federal aid costs are going up. So, it is clearly not related to that. But what are the reasons? Why can't we achieve more focused missions for the colleges and universities in this country, so that there is less overlap and each does a better job of serving its clientele? That is probably the most fractious issue in state policy. Well, these are important issues, but they do not address the question of undergraduate quality and that is where I think we should focus.

THE NATURE OF THE PROBLEM

Let me tell you what I think are some of the questions in the undergraduate area. Are students well educated? Do we have any evidence as to whether students are well educated or not? Do we think seriously about assessing what they are learning? Have we thought about what it means to be well educated in the 1990's, in light of the changes in our world (and we all recognize that it's changing at a very rapid rate)? How would we know the answer to this? Do we use the information available from our own research about learning to help us decide what we ought to be doing? Is a college education still the road to success? Is it the pathway to social mobility? Is it working? If so, why are there so many who have the opportunity to enter college who do not, or who do enter but then decide that it is not worth it and drop out? Or, maybe the central question for today ought to be what the role of the faculty is in all this.

There has been much discussion at the elementary and secondary level about the fact that the reform movement in elementary and secondary education has now reached the point where it must move into a new dimension, that there must be a substantial new sense of ownership on the part of the teachers and the principals and that it cannot go on being a top-down set of mandates. There must be a new style of leadership that draws people into a participatory mode, where the actual school must be the central unit on which we focus. There must be a good deal more autonomy in those schools, and teachers and principals must find a way to work together. Well, all of these are conditions that already exist in higher education. But does it create a positive climate for change? Does it create a sense of community and a sense of purpose? Finally, maybe the toughest question is, can we change?

What stands in the way of change? Is it resources? We all know this is a period where federal resources are declining on a slow, but steady basis. State resources are tight because the states have difficult budgets. There is a pressure to limit the growth of tuition. We know that it is a period of constrained enrollments. What has kept enrollments up is that even though first-time freshman are down about 12% since the peak, the gradual growth of the number of part-time students has kept the colleges full.

I. WHAT IS THE NATURE OF QUALITY?

Well, let us start with the question, when it comes to quality, what is it that we would like? Or, maybe the question should be put a little differently and should ask who wants a change and why do they want it? I would argue that there is abroad in the country a very powerful movement to encourage change in higher education and it is growing more powerful all the time. That movement is being spearheaded by state governments. Why is it coming from them? One reason is that we are in the midst of, as you well know, a powerful sense of international competition. The world is simply more demanding and difficult. There was a time when American hegomony was such that what happened in Korea was something about which we felt we might do something on a peripheral basis if we could help the Koreans out. Now, we live in a world in which it is plain that if we are going to remain a leader in the world, or even maintain our standard of living, we are going to have to operate in different ways.

If one looks at the evidence carefully, one finds that, in fact, we are not quite maintaining our standard of living. In real dollar terms over the last five or six years, even though job growth has been strong in the United States, median wages have slightly declined. Family income continues to climb slightly, but that is because more members of the family are working. For the first time in American history over any extended period of time, median income has actually been declining during a period of prosperity. Why? Because we are finding it very tough going in the international world. The point I want to make is that we have, particularly at the state level and now finally in Washington, come to the realization that this country is going to have to do things differently. When we say that we mean that businesses must manage themselves differently, invest in technology and think seriously about every aspect of how things are done. Above all, there is a need for a constant reassessment of what is being done and how well it is being done. We know this is required of businessmen to be successful in these times, and of political leaders, and of school leaders. We know that elementary and secondary education simply will not stand up to the rigorous atmosphere of the international world.

What we have yet to come to grips with is that this same set of questions has to be asked about us in higher education. We have been prepared to ask them about our colleagues and neighbors in our society, but not about ourselves. The reason that our failure to assess ourselves will be less tenable every day is that a few years ago, as this country began to examine its role in the future, what the world was going to be like, every single state had at least one, and usually two or three task forces, or commissions, or blue ribbon committees, examining the future of that particular state. Each concluded that the future of the state required a careful assessment, a determination to improve, and a focus on the quality of education — both elementary and secondary, and higher education.

II. CAN WE OUTTHINK THE REST OF THE WORLD?

The issue is no longer whether we can out-produce the rest of the world; rather it is whether we outthink the rest of the world. It used to be a world we dominated because of our skill in creating big hierarchal organizations: U.S. Steel, General Motors, AT&T. We were the envy of the world. The problem is that today others can do it as well or better. We do not have U.S. Steel anymore — it's U.S.X. and you know what X means. We do not even have AT&T. Where did it go? So the question ahead of us is whether we can adapt ourselves for this different and more demanding world. The second reason that the question of the quality of higher education has emerged is that the world is getting more complex. Just think of the changes going on in the technology related to birth, or pollution, or nuclear power or international trade. The list grows steadily. We are struggling with this enormous array of questions that are not only sophisticated technologically but sophisticated politically, socially and legally. Here we are in the courts debating who owns Baby M. We don't know how to address that question, let alone the more complicated questions looming just behind this.

We are in a complex, competitive world, and we have sold our country the idea that education is the key. The country now wishes to ask us, if this is the key, how well are you doing? I also mentioned earlier that there is a second imperative. Education needs a purpose and a goal. It is hard to generate the resources higher education needs or to create the excitement that is so essential to the process of teaching and learning, unless one has some sort of a goal. Clearly, if we are to be intellectually sound, self improvement must be a central element of that goal.

What does this say about our graduates? What should they have in the way of knowledge, skills and attitudes? Some of the attributes that they need flow out of what we have said about ourselves over the years — that is to say, our traditional view of an educated person. A person ought to be rigorously educated. Are Americans rigorously educated? The only answer to that, as you well know, is yes and no. Sometimes yes, in some subjects yes, in some places yes, but lots of times, no.

Let me give you an example. The states have begun to test college and university graduates to see if they should be certified to be teachers. They began to test them, and as you know, in state after state, the results poured in. They had to water down the tests, and they had to go back again, and offer second and third chances for the people who wanted to become teachers. It was an embarrassing proposition for us. And it was even more embarrassing when a few legislators began to raise questions such as, "Why is it that the graduates from the best universities in this state cannot pass a simple test in mathematics or a simple test in writing or a simple test in reading? Does this say anything about the quality of our bachelor's degree?" The answer, of course, is that in many ways we have not been rigorous and demanding enough. The tests of American college students in mathematical skills show that most of them lack adequate knowledge of mathematics. The same might be said about the knowledge of most students in science, literature or other languages. We have a considerable distance to go to think about the question of rigor.

Also, there is a set of skills about which we have a growing body of research literature. Are students good at analysis? Can students transfer information from one field to another? Can students learn methodology in sociology and apply it to a problem that they are looking at in history? Can they apply concepts across fields generally? In other words, have we taught students such things as the higher order literacy skills? Have we taught them writing skills? The answer, again, unfortunately, is partly yes and partly no. There is no question that most American college graduates (to say nothing about the other half of the entering students who never graduate) have serious shortages in their intellectual arsenals. We are far from meeting the standards that we have defined for ourselves for well-educated graduates.

Finally, I would add one more thing which is a question of a common culture. A few weeks ago, I was rereading the Truman Report which came out in 1947. I don't know if you remember it. It was sometimes called the Zook Report, after the chairman. It talks about the question of a common culture and it points out that we were then moving toward a fragmented curriculum with more emphasis on different disciplines; with students moving more into professional fields and with less and less emphasis on a sense of common culture. Since that time, the trend has become more pronounced. If we were to apply only the traditional campus-based values that I have been describing, we would say that many students graduate ill-educated.

PUBLIC NEEDS IN THE 1990'S

A. Creativity

There are a set of new characteristics that flow from any thoughtful reexamination of the public's needs in the 1980's. Let me give you just three. One is the question of creativity. We have never said much about creativity, but we are now in a world where we no longer depend on those big hierarchal structures. Yet, we have been the world's most successful job creator. More jobs are created in the United States than in the rest of the industrial world combined. It is an amazing thing. But all of the jobs are being created in the small and medium sized companies. Why? Because those are where the creative cutting edge companies are. I am not just talking about technology as a cutting edge. I am talking about all kinds of things. So, what we want is that kind of creativity. That is the question in Japan where there is a huge debate going on about higher education because they see they do not have that characteristic and they now know that they cannot live by the hierarchal mode of corporate structure that they developed and beat us at. The Koreans and Malaysians in Singapore and Taiwan are beating them. So they look and say, we must be creative. How can the Americans do it? They are more cretive than we are. We must change our education system. Well, so must we because that is our strength. How do we encourage creativity? Do we encourage creativity? If one were to look at our colleagues around the country, one would find that often there is a tendency to stamp out creativity on the part of students, rather than to foster it.

Let me give you just one example that we did a while ago when we were doing the Carnegie Foundation Study, Higher Education and the American Resurgence. We asked three hundred students: "Suppose you were taking an essay exam with five questions, the first four fairly straightforward. The fifth one, you look at it and you say that question somehow is worded wrong. Would you be willing to first answer the question to the best of your ability then say, however, I think this question is worded poorly. It is a little off target for this course. I think it should be worded like this and then I would answer it in this way." All three hundred said, not on your life. And we said, well now wait a minute. This would show that you are thoughtful, creative, and that you really understand. And they said you have got to be out of your mind. And every single one said this, without exception. It was not 299 or 298 - it was 300. Well, why? Because you would get killed. Well, what do you mean? Why, you would get murdered. But wouldn't it show that you really understood? Listen, who cares about that. I am out there to pass the course. Why? Because I gotta get the credits. Why? Because I need the degree. Why? Because I want a good job.

Now, we may not actually have marked them down for that. But, they believe it. And as long as they believe it, they act on it. So the question is, are we encouraging creativity?

B. Self-confidence

The second issue that comes up more and more is what I would call self-confidence, the ability to take risks. It is partly connected with the last question but, it is also connected with other things. If this is a world in which the U. S. is facing constant change, industries go, new things develop all the time, we are constantly into change, constantly into risk-taking and constantly into entrepreneurial skills. Do we encourage those things, and do we, above all, give students a sense of self-confidence that they could cope with these things? Well, I would here again argue that the evidence that we were able to dig up says we are better than the rest of the world and we are certainly better at creativity, but we are somewhat limited.

C. Civic Responsibility

The final one I would argue is a question of civic responsibility. We got into this because we began to ask ourselves if society is more complex, how do we deal with the complexity and what is the role of a citizen? Certainly the sole role is not to prepare yourself for a successful career, even if it helps the country. In fact, the more we got into it, the more we began to realize that the prime role of college, the one that we all said when Jefferson and Franklin were debating the question of the purposes of college, was how to prepare citizens to be citizens in this slenderly structured experiment in democracy. Well, as a result of all this debate, and getting into it and finding that the colleges had not really focused on this for a long time, the Commission did, with 250 campuses around the country, get students into community service. Why? Because we found every single measure that we could find for the last 20 years shows a steady decline in student attitude toward their responsibilities to the whole, and a steady rise in student answers about responsibility to themselves. So we said, wait a minute, that is a college responsibility and we should try and think about what to do. So we asked, community services in what way?

Those are what I would argue, at least some of the things to think about as the characteristics students need in the 1990's to be successful, not just for themselves, but for the country to be successful. Well, next question, how can we know with more certainty where we are with regard to student education? How do we know what is happening with students? Well, it is very hard to get people to focus on this. There is tremendous resistance within the higher education community to actually find out how well students are educated. There is a lot of fear that if we knew more about how to measure how well students are educated, it would be used to distort or to reduce funding. There is a lot of resistance based on the principle that we give students opportunity. There is an opportunity at our colleges for a wonderful education and it is up to the students to take advantage of this. If the student does not take advantage of it, so be it. I cannot help the student. Or, the other thing we often say is yes, but the outcomes of a college education are so complicated that you just trivialize it if you try to measure it. We say that, while at the same time we are probably the worst offenders. For example, the average graduate school focuses heavily on GRE scores and law schools focus on LSAT scores. At the same time, the people in those institutions would argue that it would be a crime to allow a single numeric indicator to be used as a substitute for what someone has learned. It is awfully hard to get into medical school without a certain level of MCAT's. Even though all three of those and every other such test does not correlate with success in life — fortunately, for those of you who got low SAT scores (and probably there are not very many in this room). But low SAT scores, as long as you are above a certain minimum, do not correlate with the fact that you are likely to do poorly in life.

Can we find ways to measure and understand where we are? Do we know anything about it? Well, there are all kinds of examples. We do it with Ph.D. candidates. We have extensive efforts with Ph.D. candidates to find out if they can think, if they know the subject field, if they can write, all kinds of things. We do it on a clinical basis with medical students, or nursing students. We have extensive efforts to find out if they know their subject. The British have an external examiner system. Then our argument is that all these things are expensive. On the other hand, it is a question of priority. For example, clearly the most extensive system of assessment in this country is at Alverno College, a small Catholic college outside Milwaukee which is probably the poorest college of any represented in this room, and yet they have the most extensive system. Why is it possible for them to do it and not Harvard? The answer is because they decided it was important. The fact is we really do not want to know. But at bottom any intellectual exercise requires knowing where it is and whether it is improving. That is just the nature of the intellectual process.

III. THE PROMISE OF SOCIAL MOBILITY—THE FAST TRACK

The third question I would ask is whether we are meeting the promise of social mobility. We believe that higher education is integral to the question of social mobility in our country. I think probably every person in this room believes that. And, in fact, the interesting thing is that if one compares, by whatever methods one uses, it is a hard thing to do. In measuring the degree of social mobility through higher education in this country compared to all other industrialized countries, we are the best. The really interesting part is that the worst are places like Russia and Poland, which I always find fascinating and they, of course, rail at us for being a country of privilege. But still there are some discouraging questions, or perhaps troubling ones would be a better phrase. For example, only half the students that enter higher education finish and get a degree. If it is important, shouldn't we be concerned that only half finish?

We did a study with the State Higher Education Executive Officers and we were trying to find out who makes it on the fast track. Where do students come from who make it through on a fast track to a degree? Because, as you well know, not everybody gets a degree in four years. In fact, slightly less than half the students who finish and get a bachelor's degree do it in four years now. Most of them take just short of five years. That is the median, just short of five. But at any rate, somewhere between 30% and 40% of the students who enter get a degree in four years. And then about 50% get a degree sometime. For community college students, which is a very large hunk of students, about 1/3 of all the students, 17 out of every 100 who enter higher education enter community college. About 33 enter and 17 complete, 2 transfer to four-year institutions and get a degree in four years. So, community college students are not at all on the fast track.

Who is on the fast track? It turns out we did a profile and it is the student who has educated and reasonably well-to-do parents who entered a four-year institution, preferably a liberal arts college, or a well-known university, and is Asian. That is who ends up on the fast track. How are minorities doing? The answer is not well. Over the last ten years, minorities have slightly declined in their performance. When I say minorities, I mean everyone but Asians since it is the other way with Asians. There is a slight decline in the percentage of all college students who are black, the percentage of all college students who graduate and are black, the percentage of all college students who enter graduate school, or who graduate from college. And those percentages decline. For example, Blacks represent now 13% of all 18-year-olds, 9% of all college students, 6% of all college graduates, 4% of all professional and graduate enrollment, and about 2-1/2% of all professional and degree-getters. And that is getting slightly worse. Hispanics are about holding level, but the Hispanic percentage of all students is rising sharply, so they are holding level but losing ground badly. Why? That is a hard question.

We have got a big project to address it. A lot of people are getting very concerned about this. I do not think we have the answers yet. The point is that we are a long way from satisfying that and, of course, we are entering into a period in which it is urgent to satisfy that problem. And we are not doing well. One interesting thing is that we have a tough competitor. When we were looking into this we had some help from James Watkins, former Chief of Naval Operations, who has been working with the Commission on at-risk students. When he was the Chief of Naval Operations he got into all these statistics, and he is the guy who pushed the personal excellence thing in the services. You know those ads that say, "Be All You Can Be"? The interesting thing about them is that they argue for personal excellence. The military has found that it can make minorities successful and it is out competing with colleges for Black and Hispanic males. What they say is come with us and you will be a success. They believe they can do it and they have got the evidence.

Well, at any rate, we tend sometimes to argue that we have to make a choice here, that there is excellence on the one hand and elitism goes with that, or there is access on the other hand and egalitarianism goes with that. Well, if you stop and think about what the demographic profile is going to be by the year 2,000, which is only 13 years away, a quarter of all 18-year-olds are going to be Hispanic and Black. There are going to be more and more kids at risk, kids who are dropping out and leaving the pool smaller and smaller. There is going to be a downward drift in the number of 18-year-olds. Half of the students in your institutions are going to be 25 years old. Twenty percent are going to be over 35. We are going to be forced to two conclusions.

One is that we must argue for standards and then be determined not only to have those standards, but to make sure people reach out to them and that we are a help in reaching out. We do not any longer take the position that the standards are there. Here is the opportunity and if you are any good, you will make the most of it. Second, we are going to have to come to grips with the fact that we and the students are responsible mutually and that we are not only responsible for how well we do, but we have a responsibility to the high schools as well. Up until now, our view of the high schools has been that those are interesting things but they have no relationship to us. How do the students reach us? They come to the admissions department by stork. After they have arrived at the admissions department, we create remedial programs to deal with them. Ninety-four percent of the public colleges in this country have remedial programs in math, reading and writing. It is going to have to be a real partnership. It has not been a real partnership so far. Most of the 1970's in higher education were spent arguing the case for equity and most of the 1980's arguing the case for standards, and now, I think, we have got to perform in both areas.

SUMMARY AND CONCLUSIONS

In closing, let me argue what is involved here. What is it that we have to think about on campus?

- First, we have got to change expectations that students hold. Students adjust their efforts and the standards they hold for themselves to our expectations. And one of the reasons we have been so interested in putting the case for civic responsibility forward is that one of the presidents involved in this effort says, "students are intellectual lemmings — if you show the way, they will follow". Well, that is not a good way to think about citizenship, but there is some truth to that. My suspicion is that part of the reason we are seeing this rash of racial incidents is because the government of the United States has said you do not have to think good thoughts anymore. You can think less than good thoughts. It's okay — it is every man for himself out there — it's a jungle and may the wealthiest win. And we therefore, see students acting in ways that would have been totally unacceptable eight or ten years ago. At any rate, I would have to argue that we have to get expectations up.

- Second, there has to be substantially more involvement of students in their own education and in the classroom. The class must become not a place where there is a passive hierarchal mode of learning, which is what we use 90% of the time in elementary and secondary school and roughly 85% of the time in college. For most students, the experience of the classroom is not a place where they intellectually are challenged — it is a place where they make careful notes and read them back.

We had a fascinating experience a little while ago at Dartmouth in which we had said that we wanted to test whether the students did this and they gathered a group of students together. The faculty said all classes at Dartmouth involve the student in intensive interchange. The students said it never happens. The truth is probably in between.

- Third, there needs to be extensive faculty contact in the classroom and out of the classroom. That is even more important for students who are both working and commuting. But we do not have much of that. Twenty minutes a semester is what most studies show.

- Fourth, there needs to be new forms of leadership in which the administrators and the faculty mutually look at how to lead the campus. I say that here because in discussing collective bargaining you have got to remember that this is going on in industry where we found that the Japanese had a big advantage because they were mutual in their involvement. We have got to find a way to do that and it needs to be a two-sided effort. That means the hardest place to change will not be with you, but with the administrators.

- Fifth, can we bring change or is the politics of the status quo on the campus so powerful that you cannot get anything done? Somebody I know calls it "Zen politics" — if there is no solution then there is no problem. I think that we cannot allow that to be the case.

There is sort of a sense that you cannot ever move a campus. I do not know if you know the story of the two presidents who are having this conversation. One of them says, "I can't believe it, I just came back from the faculty senate and I went to them with this beautifully crafted proposal for change in our education program and there was a long, wonderful debate. And finally at the end the faculty senate chairman stood up and said, "Mr. President, I think I can sum up the attitude of the faculty. The attitude is let's wait and see". The other fellow looks at him and says, "Boy, you're way ahead of us". "Way ahead of you — how could I be way ahead of you?" He said, "Well, we had the same kind of thing. I brought this beautiful proposal in, had a big debate and finally the faculty senate chairman said, "Mr. President, I think I can sum up the attitude of the faculty — it is too early for a wait and see attitude."

These are problems that lend themselves only to an intense mutual interest and lots of leadership. The role of the president, the dean and every other officer, and every faculty member must be to expand leadership on the campus, not to share it, but to expand it. What we have to do is to recognize that the world now is asking us if we can't do it better because we are so important? Isn't that better than if they didn't give a damn? Well, the only difficulty with that is we have to perform. I will leave you with one thought as to why this is so difficult and it fits every one of you. Einstein was the one who said it. He said, "Great spirits have always encountered violent opposition from mediocre minds." Just think of that the next time you try and bring change to your campus.

THE PROFESSORIATE: VITALITY, DEVELOPMENT AND RENEWAL

B. THE AMERICAN PROFESSORIATE: REWARDS AND SATISFACTIONS

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INTRODUCTION

In looking over the conference program, I wondered if this first session on faculty development and renewal was planned as a kind of invocation, analogous to singing the "Star Spangled Banner" before the beginning of a ball game. Throughout the history of the American labor movement — as this group knows better than most — there has been considerable skepticism about job enrichment; union people have much preferred better pay, improved benefits, and the protection of rights.

For many in the American professoriate, the concern with faculty renewal and development has been viewed with the same skepticism. The terms themselves — development and renewal — are immediately suspect. The analogies are medical and remedial; the implication is that some faculty are either sick or slow. The metaphors we use are telling: deadwood, over-the-hill, and run-down, not much to identify with there. In addition, faculty have watched a generation of industrial psychologists make a profession out of the cultivation of the "happy worker" and are profoundly suspicious of the possibility that similar strategies might be utilized in the academic work place.

Fifteen years ago, when faculty development was first identified as such, efforts at renewal were intentionally placed on the periphery of institutions. The focus was primarily on teaching improvement and personal consultation; priority was given to confidentiality and work with individuals. The faculty development office was usually located in an obscure part of the campus where faculty could go unobtrusively in search of personal assistance, far removed from centers of decision-making and institutional power.

More recently, however, the concern for faculty development has moved from the margins of institutions to the center. The effort has shifted from being oriented to the individual to being primarily organizational in approach. No longer is faculty development conceived as an independent entity out there on the soft edge of the campus; it has moved, rather, to the heart of efforts to maintain institutional vitality.

There is widespread recognition that if colleges and universities are going to be vigorous and dynamic, attention must be paid to the vitality of faculty. It is also evident that the vitality of faculty is rooted, not just in the intrinsic quality of our work, but in the extrinsic as well, in salary schedules, opportunity structures, reward systems, and workloads.

The interest in faculty development has turned to structural issues in the academic work place, to issues that have long been the focus of collective bargaining. The major challenge now to those most concerned with faculty development is the relationship of the structure of extrinsic rewards to the intrinsic meaning so long assumed to be readily available to faculty in academic work.

INTRINSIC AND EXTRINSIC REWARDS

For many years, it was commonly assumed that faculty satisfaction and morale were sustained at a high level by the intrinsic qualities that mark the profession. The intrinsic characteristics most often associated with the work life of faculty were these: intellectual challenge, interaction with bright students, autonomy (control over one's work), participation in key decisions, trust, variety and wholeness (depending on the field), and the sense that one was making an important contribution. Earlier studies of job satisfaction generally supported this common assumption.

A more recent study at the University of Michigan[1] looks at the changes that have taken place in the profession and questions the adequacy of this earlier assumption that intrinsic characteristics are sufficient to sustain faculty satisfaction. After surveying the erosion of the extrinsic characteristics of the profession — e.g., salary structure, workload, supervisorial practices, and opportunity structure — Austin and Gamson arrive at conclusions that are very similar to Herzberg's two-factor theory.

Austin and Gamson found that in the contemporary situation, the balance between the intrinsic and extrinsic characteristics is a delicate one. The intinsic features of the academic profession may help keep satisfaction and commitment fairly high, despite changes in the extrinsic. Intrinsic elements, however, may not be able to compensate for too much erosion of the quality of the extrinsic. Those with a serious interest in faculty development and renewal must attend to the adequacy of extrinsic characteristics such as salary, workload, and opportunity structure. Faculty satisfaction and morale continue to be maintained by the intrinsic rewards inherent in academic work (you cannot buy satisfaction), but the relationship to the extrinsic is both important and delicate.

PROFESSIONAL COMMITMENTS AND WORKING REALITIES

Faculty satisfaction has been seriously eroded by the discrepancy that has developed between a professional image — a social fiction — that dominates the profession and the realities of the academic work place. I am convinced that much about human life is defined and shaped by socially constructed fictions, patterns of meaning that cohere in a particular time and place. The American poet, Wallace Stevens, said it best:

> The final belief is to believe in a fiction, which you know to be a fiction, there being nothing else. The exquisite truth is to know that it is a fiction and that you believe in it willingly.

Nowhere in the contemporary world do these socially constructed fictions have more power in our lives than in the professions. And there is no profession where a socially constructed professional imagery dominates more thoroughly than among faculty. Reference needs only to be made to the years of graduate school socialization and to the power that academic mentors have in the lives of faculty to make the argument.

Beginning in the late 1950's and extending through the following decade and a half — a period frequently referred to as the "golden age" of higher education — a powerful fiction, an image of what it meant to be an academic professional, became firmly established among faculty. It is often reflected in institutional policy, but most solidly ingrained in our own conceptions of ourselves as professionals.

During those days of affluence and rapid expansion, a consensus emerged regarding what it meant to be fully professional academically. Most of the constituent elements were already a part of American higher education, having been imported earlier from Germany, England, and Scotland, but during that expansionist period the several parts came together to form a conceptually coherent whole. The basic assumptions that clustered together to form this dominant professional image were the following:

1. Research is the central professional endeavor and the focus of academic life.
2. Quality in the profession is maintained by peer review and professional autonomy.
3. Knowledge is pursued for its own sake.
4. The pursuit of knowledge is best organized according to discipline (i.e., according to discipline-based department).
5. Reputations are established through national and international professional associations.
6. The distinctive task of the academic professional is the pursuit of cognitive truth ("cognitive rationality").
7. Professional rewards and mobility accrue to those who persistently accentuate their specializations.

This professional vision and the interrelated complex of assumptions on which it was built is being questioned here, not because it is inappropriate in itself, but because it has become normative for the majority of faculty who are working in educational contexts where it is neither directly applicable nor supported by the reward system. This conception dominates the way in which faculty think about themselves professionally, and, as a result, the majority see themselves as professionally second-class; satisfaction with one's work is systematically undermined.

In institutions facing retrenchment, this one-dimensional professional conception is being used to rationalize very difficult and often arbitrary judgments. In some institutions in distress, it is being invoked as an anesthesia in the management of pain.

Junior faculty are having a difficult time meeting the demands established by the assumptive world of the academic professional outlined above and the new institutional expectations being invoked on their local campuses. Bowen and Schuster[2] have recently characterized the career of the junior faculty member as a "grueling and lonely ordeal".

In reviewing the changes that have taken place over the past two decades, Clark Kerr[3] points out that the bulk of the monumental growth during that period was absorbed, not by the research universities (where the academic professional model is most appropriate), but by the rest of the system of higher education. In fact, the percentge of all enrollments in Research Universities I (Carnegie classification) actually fell between 1960 and 1980 from nearly 20 percent of the total to 10 percent. The real growth was in institutions where the established academic professional model was only marginally appropriate. Yet, most faculty measure their success as professionals by that dominant conception. This mismatch between professional ideal and working realities is creating serious problems for both institutions and individual faculty.

SATISFACTION AND INSTITUTIONAL TYPE

Over the past fifteen years, I have worked with faculty across the whole spectrum of institutional types in American higher education and am now involved in a sizable study of "The Future of the Academic Workplace in Liberal Arts Colleges". I want to share with you some of the preliminary findings from that study, but would first like to make some general observations about the levels of satisfaction and morale across the various sectors of higher education.

Because the image of the academic professional discussed above is so powerful and has such a direct impact on faculty satisfaction, the faculty that I find included among those most satisfied with their work are the tenured professors in research universities. They are doing what they were educated and socialized to do. They are also provided the time and resources required to meet the research demands that are placed upon them. This is not to say that budget cuts and the political struggles to maintain what they had in an earlier period are not sources of profound discouragement. But, there is congruence between the professional image they have of themselves and the working realities they confront daily.

A second group of faculty with relatively high satisfaction and morale are the full-time community college teachers who are there because of the challenge. There are many who feel "stuck" (in Rosabeth Kanter's sense)[4] and demoralized, if they conceptualize their careers in accord with the academic professional model outlined above. There is a large group, however, who see their teaching as a "vocation", a calling. In California, they see themselves as playing an important role in making democracy possible in a pluralistic world. While other faculty complain about the underprepared students and the cultural diversity they confront in the classroom, this group of faculty welcome the challenge. They are concerned about student development and interested in applied learning theory. They themselves continue to learn and are comfortable being teachers.

A third group of faculty who register both high satisfaction and high morale are those in a particular kind of liberal arts college. Here, I want to turn to the study of "The Future of the Academic Workplace" being conducted under the auspices of the Council of Independent Colleges. It began as a large quantitative study involving 9,815 faculty surveys and a total of 151 colleges. On the basis of the surveys, ten colleges were identified as institutions where faculty satisfaction and morale were markedly high; case studies of these institutions are now being conducted. The preliminary returns on the data from these case studies indicate that high faculty satisfaction and morale are most directly correlated with:

1. a distinctive organizational culture to which faculty are firmly committed;

2. leadership that is participatory, yet marked by authority;

3. a commitment to faculty development (formal faculty development programs do make a difference); and,

4. confidence that a "good faith effort" is being made to improve salaries and other extrinsic rewards.

All ten of these exemplary colleges have a strong sense of community that is deeply rooted in a distinctive culture and supported by the leadership.

At the other end of the satisfaction/morale spectrum are, regrettably, a large number of faculty who can be grouped by institutional type. One immediately thinks of the permanently part-time community college instructor who is obviously being exploited and the junior faculty member in the more selective liberal arts college who is required to be first-rate at everything (teaching, research, and service) and rigorously evaluated at every turn.

The place where I find the greatest dissatisfaction and the lowest morale among faculty is in the teaching universities of this country, that second tier of universities where teaching loads are fairly heavy and there is little support for research, but research and the professional assumptions that attend it form the basis for evaluation, promotion, and prestige. Teaching and the kind of scholarship required to sustain quality undergraduate teaching are not honored. Faculty are torn between a professionalized ideal and the hard realities of the work place. Frequently, these are institutions where faculty have turned to collective bargaining in order to cope with an administrative bureaucracy characterized by what Georg Simmel would have designated as alienating domination rather than legitimate authority marked by mutuality.[5]

TOWARD GREATER SATISFACTION: CHANGES I WOULD LIKE TO SEE

Allow me to conclude by outlining some changes that I believe would enhance faculty satisfaction and morale:

First, I would like to see us move toward a conception of the academic profession that is multi-dimensional. It should recognize the full legitimacy of a variety of career paths and allow faculty to build on individual interests and strengths. Heterogeneity should be valued. Despite the pitfalls, there is much to be learned from research in the corporate sector. Research on managerial careers has demonstrated that organizations benefit from recognizing and rewarding individual differences. The works of Edgar Schein and Michael Driver, which match individual career orientations with organizational structure, are important here.[6] Organizational policies and structure can encourage faculty growth and development or foster stagnation.

This alternative approach will require deans and department chairpersons to know more about the changing commitments and interest of faculty in their units. They will also need to know about the opportunities available (both within their institutions and without) for enabling faculty to grow and change in ways that benefit both the individual and the organization. Individualized approaches that take into consideration both age and career stage will be necessary.

Second, a key issue affecting faculty satisfaction is the place of scholarship in the profession. According to the older professional model, research was given priority and teaching was seen as derivative ("a good researcher is a good teacher"). The peculiar kinds of scholarship required for quality teaching were largely neglected; if one were not engaged in substantive research — which was true of the majority of faculty — scholarship could also be deferred. Scholarship was identified with research, not teaching. There needs to be a primary focus on scholarship more broadly defined. It may very well lead to publication in highly specialized disciplinary journals, or it may be disseminated in some other, more local or applied form.

All college and university faculty need to be involved in serious, substantive scholarship; good teaching requires scholarly support. Provision for peer review of all scholarly work should also be required, so that what faculty present to students is also reviewed by professional peers. Without at all denigrating the importance of specialized, disciplinary research, this other form of scholarship — tied directly to teaching and learning — needs, also, not only to be carefully assessed, but honored.

Third, we need to rethink the epistemological assumptions that inform our teaching, our assumptions about how we know. The criticism of the "objectivist approach" to teaching and learning that has dominated higher education is now being effectively articulated and is receiving a wide hearing. Most faculty focus on what is said and done in the classroom — on content — and have paid little attention to the way in which students "make meaning" out of what is done and said. Following the lead of William Perry,[7] there is a growing interest in what is called a "constructionist" approach to learning, attention is being paid to the relationship between the knower and the known, the self and the world.

Finally, we need a broader understanding of what it means to be professional, the societal dimension of our professional self-understanding has been severely attenuated. A recent book by Robert Bellah and his colleagues addresses this issue and has received a great deal of attention; it is entitled Habits of the Heart.[8]

The title of the book is taken from the man who, after a century and a half, remains the most perceptive analyst of democratic institutions in America, Alexis de Tocqueville. "Habits of the heart" were what de Tocqueville saw as that special intellectual and moral condition that made it possible for Americans to link individual freedom and common interests, personal life and civic responsibility. It was the "habits of the heart" peculiar to Americans that gave this rather skeptical French aristocrat the hope that in America democracy could really flourish. The authors of Habits of the Heart argue that American individualism may have grown cancerous in recent times, that the importance of community has been lost, and we have been cutoff from a sense of common life and our shared memory.

Bellah and his colleagues contend that education has become an instrument of individual careerism, an approach that can provide neither the personal meaning nor the civic virtue required to sustain a free society. The college and university today is viewed as the place where one goes to fulfill his or her private dreams of individual success, separated from community and public life. Enduring satisfaction requires more.

The questions I want to leave with this conference are: Does collective bargaining in higher education contribute to the individual career hustle and the focus on the self that Bellah and others are lamenting? Is collective bargaining merely another form of "looking out for number one"? Or, does it represent the sense of solidarity, of working together in collaborative ways to protect, not only legitimate self-interest but, the common good?

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THE PROFESSORIATE: VITALITY, DEVELOPMENT AND RENEWAL

C. INSTITUTIONAL RENEWAL THROUGH FACULTY DEVELOPMENT: SYRACUSE UNIVERSITY'S PROGRAM

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In a provocative book written some 25 years ago, John Gardner[1] wrote about the need for continuous renewal on the part of both individuals and institutions. In Self-Renewal, Gardner discussed the need for organizations and individuals within them to counteract their natural tendency toward a narrowing of scope and interests by being constantly open to innovations and change. Faculty and organizational development programs could, if designed properly, help keep individuals and institutions renewed and vigorous.

BRIEF HISTORICAL OVERVIEW OF FACULTY DEVELOPMENT

The faculty development "movement" is relatively recent, within the past 15-20 years. Prior to 1970, faculty development was restricted largely to sabbaticals and leaves. The sabbatical had started a century earlier as an import from the German University to support research and writing.

In the 1970's, faculty development practices focused mainly on teaching improvement, in part, as a response to the turbulent late 1960's when students and others began raising questions about teaching and the curriculum. A survey of colleges and universities conducted in the mid-1970's revealed four major categories of development practices.[2] These four categories were evident in some combination at slightly over half of the institutions in the country.

1) Instructional assistance practices (e.g. instructional development or instructional technology specialists provide help).
2) Assessment practices (i.e. using of evaluation information from students, colleagues, etc. for instructional improvement).
3) Workshops and seminars (e.g. on methods of instruction, updating research and scholarship skills).
4) Traditional practices (e.g. sabbaticals, travel grants, visiting scholars).

These categories still exist at about the same proportion of institutions (over 50%), although additional categories added by some colleges in recent years include the retraining of faculty members to teach in fields with high enrollments (from current low enrollment areas), and pre-retirement counseling.

As a way of illustrating some of the above categories, following are examples of some specific activities at Syracuse University aimed at improving what faculty do as teachers and researchers.

THE CENTER FOR INSTRUCTIONAL DEVELOPMENT

The Center has been in existence for some 15 years or more. Its purpose is to help departments and faculty develop their curriculum and courses. This is done through a systematic approach of assessing the actual and intended outcomes of a course, and then designing the course with the appropriate content and methods to best realize those outcomes. Staff members from the Center work with faculty in a consulting role, collecting appropriate data from students or others as needed, to design programs and courses.

A number of two- and four-year colleges have similar instructional development operations. A major advantage of this approach is that it does not focus on the individual teacher's behavior at the outset but rather on the course or the program. In this respect, it is less threatening to the teacher. Syracuse University established in the past year a new Vice President for Undergraduate Studies. This office focuses on undergraduate teaching and the undergraduate curriculum and has several activities underway on undergraduate instruction. These include:

1) A year-long program to facilitate interdisciplinary course development. A group of interested faculty members will be supported in redesigning or revising courses that "help students appreciate the culture of their particular field and the effect of its practices on neighboring fields". The purpose of the program is to counteract both teacher and student over-specialization by integrating the liberal arts and the professional components of the curriculum.
2) Given the importance of freshman level introductory courses, special attention and resources are being focused on these "gateway" courses. New designs and innovative approaches to instruction are being encouraged and supported.
3) The Undergraduate Studies Office, together with the Graduate Office, are sponsoring a new Teaching Assistant Program beginning this summer (1987). All TA's will be supported by the university to attend a one- to two-week orientation and teaching preparation program. The program will include sessions on such topics as: Effective lecturing, knowing and interacting with your students, leading a discussion, evaluating students and providing feedback, and self-evaluation. Each TA will also be videotaped in a microteaching presentation. For international TA's, a second week of the program will deal with oral communications in American English, characteristics of American students, and the structure and organization of the American university. Follow-up activities during the year include consulting with an experienced "TA fellow" assigned to each new TA and various department supports. What began in the summer will, in short, be reinforced throughout the year. Given that most faculty members get so little preparation in teaching, this may be the only opportunity some of these people will have to learn about a major activity of their professional lives.

Other activities at the university include:

1) A day-long conference on teaching in which professors and staff at the university discuss innovations and improvements in teaching. Other colleges and universities have similar events but the problem at these and companion workshops is that generally the better teachers rather

than those most in need of help will attend.

2) At one of the colleges a group of interested faculty uses peer coaching to help improve instruction. Faculty members choose a colleague to work with in diagnosing classroom teaching (using videotapes at times) in an attempt to obtain suggestions for improvement. Most colleges also provide student rating forms for faculty use at the end of the semester for instructional improvement or tenure and promotion decisions. In this respect, this university is like 90 percent of the other institutions around the country. I have been experimenting with using electronic mail to allow students and teachers to communicate continuously about a course. Students are able to send anonymous messages to teachers from the first day of class on computer terminals scattered about the campus. Teachers can respond to the indivdual students through an I.D. number. In the three classes where we have used this approach thus far, useful student comments have included questions about course content or suggestions for course changes.
3) At research universities, faculty research productivity is generally given more weight in tenure and promotion decisions than is teaching performance. While this is consistent with the stated purposes of these institutions, it may be that teaching gets even less weight than it should because it is also viewed as totally subjective in its evaluation. To help the tenure and promotion committees at each of the SU colleges get a better fix on each candidate's teaching performance, a committee at the university has put together a handbook of what to look for and how to best assess teaching.

FACILITATING RESEARCH AT THE UNIVERSITY

Like many other universities, Syracuse University has a research fund to help faculty members get started in promising projects for which funding may not yet be otherwise available. Grants are administered through the faculty senate and total close to $400,000 for the forthcoming year. Like most other universities, Syracuse has offices to help faculty members obtain funding from government and foundation sources.

CONCLUSION

Although colleges and universities have no legal obligation to provide faculty development programs, it makes good educational and economic sense in the long run. Most business organizations spend a sizeable portion of their budgets on employee development even though they turn over much of their staff. With a high proportion of their staff having tenure, colleges have even more reason to support faculty development.

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II. PROFESSIONALS AND THE WORLD OF WORK

A. COLLECTIVE BARGAINING BY PROFESSIONAL EMPLOYEES

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PROFESSIONALS IN THE WORK FORCE

An increasing proportion of the American work force is composed of professional and "semi-professional" employees working for organizations: teachers, college professors, nurses, librarians, social workers, scientists, engineers, journalists, performing artists, and, most recently, lawyers and doctors. Unionization and collective bargaining have become attractive to many of these professional employees. Although most professional employees have not formed unions, professional associations, in a number of fields, have transformed themselves into unions, new unions of professional employees have been formed, and established unions have expanded into the area of professional employment. It is impossible to obtain precise figures, but a recent study estimated that between 25% to 30% of professional employees are organized in labor unions, a higher proportion than the labor force as a whole. Some labor economists believe that unions of professional employees present the same opportunity for American unionism, which has recently suffered a decline of one-third in its representation of the work force, that the new industrial unions presented in the 1930s, at another low ebb of the union movement.

Recent discussion of collective bargaining by professional employees has understandably been dominated by the 1980 decision of the United States Supreme Court in NLRB v. Yeshiva University, (444 U.S. 672 (1980)). As you know, the Court held that the faculty at Yeshiva are managers and, therefore, are not covered by the National Labor Relations Act (NLRA). Prior unchallenged precedents, Justice Powell emphasized in his opinion for the five-person majority, had held that professional employees are ineligible to bargain under the NLRA if they also have supervisory or managerial responsibilities. Powell identified as the "controlling consideration" the fact that "the faculty at Yeshiva University exercise authority which, in any other context, unquestionably would be managerial". He cited the faculty's "absolute" authority in academic affairs. "To the extent the industrial analogy applies", he added, "the faculty determines, within each school, the product to be produced, the terms upon which it will be offered, and the customers who will be served". Justice Powell also pointed to the faculty's "predominant role" in faculty hiring, tenure, sabbaticals, termination, and promotion. Conceding that faculty members may act in their own interest, rather than in the interest of their employers, Powell claimed that this faculty independence only increases the danger of divided loyalty that the managerial exclusion is designed to prevent. There is no one "above" the faculty to check the pursuit of selfish union interests at the expense of desirable educational policies, and these policies form the heart of the university's "business". In Powell's opinion, the university's extraordinary reliance on the faculty's judgment in formulating academic policies makes the danger of divided loyalties particularly acute.

By defining faculty members as managers, the *Yeshiva* case constituted a major step beyond earlier decisions. Previously, the NLRB and the courts had declared only a few professionals in a work force outside the protection of the NLRA as a result of their supervisory or managerial status: for example, administrative accountants, plant construction engineers, head nurses, and academic department chairmen. In *Yeshiva*, by contrast, the Court, for the first time in the 45-year history of the NLRA, excluded from its coverage a large group of professional employees.

An NLRB decision in 1982[1] underlines the implications of the approach to collective bargaining by professional employees inaugurated in the *Yeshiva* case. The NLRB held that the faculty of a college of osteopathic medicine had become managers by obtaining additional responsibilities for academic matters through collective bargaining. The Board conceded that the faculty did not have managerial authority before it formed a union. But the Board also rejected the contention that a union should not be able to "bargain itself out of the protections of the Act". Rather, the NLRB assured the union that it would process a new representation petition "(i)f the College removes sufficient authority from its faculty members so that they revert to the status of nonmanagerial employees". This analysis places professional employees in an unenviable "Catch-22": To the extent that they use collective bargaining to obtain meaningful authority that many would consider fundamental to professional employment, they lose the protection of federal labor law.

Union organization of college professors at private institutions has declined precipitously in the wake of *Yeshiva*, and the NLRB has decertified many existing unions after findings that faculties possess managerial authority. The NLRB has also extended the reasoning of *Yeshiva* to other professions. In 1985, it excluded as managers the physicians and dentists of a health maintenance organization, citing their participation on various committees that establish medical policy and engage in peer review. Many predict that additional categories of professional employees will ultimately fall under the managerial and supervisory exclusions. And some commentators, including Stephen Schlossberg, the Deputy Under Secretary of the United States Department of Labor, fear that the reasoning of *Yeshiva* may even be extended to exclude from the Act's coverage workers involved in recent and often praised experiments in worker participation in decisionmaking in the industrial sector. Within the last two months, moreover, the Supreme Court's interpretation of federal labor law governing private employment has spilled over to the public sector. A hearing examiner for the Pennsylvania Labor Relations Board, relying heavily on Justice Powell's opinion in *Yeshiva*, held that the faculty of the University of Pittsburgh, a state institution, are managers ineligible to bargain under the state labor law covering public employees.[2]

CONSEQUENCES OF *YESHIVA*

Despite these significant developments, the actual consequences of the *Yeshiva* decision should not be exaggerated. Even within private colleges and universities, the area of its most immediate impact, the *Yeshiva* decision has not ended collective bargaining by faculty unions. As the "'Yeshivawatch' Disposition List" produced by the National Center indicates, the NLRB has found, in at least 18 cases since *Yeshiva*, that faculties are not managerial. Many collective bargaining relationships established before the *Yeshiva* decision between faculty unions and private colleges and universities remain viable. Post-*Yeshiva* NLRB and circuit court decisions lack coherence and cannot be reconciled with each other. Although some declare that extremely weak faculties are managerial, others find that faculties are not managerial even though they are at least as powerful as Yeshiva's.

The consequences of the *Yeshiva* decision beyond the private higher education thus far has been minimal. Only one NLRB decision has excluded physicians and dentists as managers. Unions of physicians and dentists, moreover, continue to organize and expand in both the private and the public sectors. The recent decision by the Pennsylvania Labor Relations Board is an exception to the general post-*Yeshiva* trend in public higher education. Many states, through their legislatures and labor boards, have explicitly included faculty members within the coverage of their public sector labor laws. Some of these states, such as Illinois and Ohio, have done so since the Supreme Court's decision in *Yeshiva*. In addition, throughout the post-*Yeshiva* period, the NLRB has consistently rejected claims that other groups of professional employees, previously included under the protection of the NLRA, should now be excluded as managers in light of *Yeshiva*. The NLRB continues to treat nurses, engineers, scientists, lawyers, and other professionals as employees covered by the NLRA. Particularly as an increasing proportion of the NLRB and the federal courts consists of people appointed by President Reagan, the possibility exists of extending the rationale of the *Yeshiva* decision to other professions, and even to workers who are part of innovative participation plans in the industrial sector. But, it seems to me as least as likely that this rationale will be confined primarily to faculty. After all, college professors, even at institutions with relatively weak systems of faculty governance, have a greater role in formulating organizational policies than do most other professionals and virtually all nonprofessional employees.

APPROACHES TO COLLECTIVE BARGAINING BY PROFESSIONAL EMPLOYEES

The continuation — in fact, the expansion — of collective bargaining by professional employees since the *Yeshiva* decision provides a good reason to reevaluate, on the basis of actual experience, long-standing arguments about the relationship of collective bargaining to professionalism. Such a reevaluation, in my view, suggests modifications of traditional interpretations of labor law in the distinctive context of professional employment.

The reaction to collective bargaining by professional employees seems to fit into three categories. Many professionals consider autonomy from hierarchical control, collegial participation in organizational decisionmaking, and rewards based on individual merit inherent in the very definition of professional employment. A large proportion of professional employees, indeed, probably a substantial majority, believe that any collective bargaining, because of its very different underlying assumptions, inevitably destroys the distinctive qualities of professional work. Collective bargaining may be appropriate for industrial or clerical workers, but it is inconsistent with professional status.

Increasingly, however, professional employees have viewed collective bargaining as a legally enforceable method to preserve or obtain the same prerogatives of professional status that their skeptical colleagues perceive unions to threaten. When organizations refuse the autonomy necessary to the effective performance of professional work or make decisions on fundamental issues of personnel and policy without considering the perspectives of their professional employees, legally enforceable provisions in a collective bargaining agreement that would guarantee professional autonomy and participation seem very attractive. Collective bargaining by professional employees, many proponents add, need not mimic the experience of the industrial sector in every respect. Indeed, they emphasize the responsibility of professional employees to develop, through their unions, new forms of collective bargaining appropriate to the distinctive backgrounds, roles, abilities, and interests of professionals.

A third approach, which is least popular and is becoming even less so, also advocates collective bargaining by professional employees, but seeks to emulate the traditional industrial model. Supporters of this approach claim that those who want to use collective bargaining as a legal support for professional norms, like those who oppose any form of collective bargaining by professional employees, share a pathetically romantic view of professionalism that has been rendered obsolete in post-industrial society. The professional employees who most need collective bargaining are those who have never had, or who have lost and cannot hope to regain, the idealized image of professional status. Unions of professional employees should adopt the tough adversarial stance of traditional industrial unions, whose members professional employees increasingly resemble. They should challenge decisions that injure employees rather than engage in misguided attempts to use the ideology of professionalism to obtain influence in what are inevitably managerial functions. For example, members of a faculty union should not participate in tenure decisions, but should challenge, through grievance and arbitration, decisions by administrators that deny tenure to professors represented by the union.

Because most professional employees, whether they oppose or favor collective bargaining, share a commitment both to the desirability and to the viability of traditional professional values, it is useful to review the extent to which collective bargaining has promoted or impeded these values. From this perspective, the actual experience of collective bargaining by professional employees has been decidedly mixed. On the positive side, many collective bargaining agreements have supported professional values, often by incorporating codes of professional standards promulgated by groups such as the American Nurses Association and the American Association of University Professors. Judicial enforcement of collective bargaining agreements have invalidated attempts by college administrators to abolish tenure and to make decisions about academic issues without consulting the faculty. Grievances brought under the "professional issues" clause of the collective bargaining agreement of a doctors' union and the State of California have forced recalcitrant prison administrators to give physicians adequate office space near their patients. Collective bargaining agreements provide musicians in symphony orchestras and lawyers in legal services programs with a right to vote on hiring fellow professionals. Through collective bargaining, nurses have obtained protection against being assigned to nonprofessional duties (such as housekeeping) or to professional duties for which they are insufficiently trained (such as ICUs). Engineers and scientists in corporations have won rights to publish research papers on non-confidential topics and to attend professional meetings on company time. Journalists can remove their by-lines when they believe that editors have altered their articles beyond recognition, and writers for television and movies have contractual rights of access to directors during production. Just as librarians have achieved formal rights to participate in book selection, social workers have negotiated a role in formulating agency policy. These examples of support of professional values through collective bargaining can easily be multiplied. Moreover, self-interest and professional interests often overlap. Collective bargaining agreements that limit class size and case loads make life easier for teachers and legal services attorneys, but they also promote a higher quality of teaching and legal representation.

On the other hand, some aspects of collective bargaining by professional employees validate the worst fears of those who oppose unionization as a threat to professional values. Lawyers who have worked in or represented legal services organizations and a radical sociologist who has studied them agree that collective bargaining has produced more adversarial relationships between staff attorneys and managers, which have impaired cooperation on professional issues. A teachers' union effectively prevented a nonunion teacher from commenting on a proposed collective bargaining agreement at a public meeting of the school board until the Supreme Court, on first amendment grounds, overruled the prior decisions of the state labor board and courts.[3] A union of community college teachers negotiated a collective bargaining agreement that essentially limited faculty participation in governance to union members. The Supreme Court upheld this result, despite lower court rulings that it violated the first amendment.[4] While acknowledging that "there is a strong, if not universal or uniform, tradition of faculty participation in school governance," the majority opinion emphasized that there is no "constitutional right of faculty to participate in policymaking in academic institutions".

PROFESSIONAL VALUES AND COLLECTIVE BARGAINING

In my opinion, many of the results of collective bargaining that are inconsistent with traditional professional values can be traced to the inappropriate transposition of legal doctrines developed in the industrial sector to the distinctive setting of professional employment. Unfortunately, this transposition often deters a professional model of collective bargaining and encourages an industrial one. For example, the facts of the two Supreme Court cases I just mentioned reflect the operation of the doctrine of exclusive representation. This doctrine gives a union that has won an election in an appropriate unit of employees the exclusive right to bargain on behalf of everyone in the unit, including the employees who have not joined the union. In many circumstances, it is an unfair labor practice for an employer to discuss with individual employees matters in which the union has a legitimate interest. Yet most professionals, whether or not they are members of a union, believe that their training and expertise entitle them to present their individual views on matters related to their employment. Similarly, the distinction between mandatory and permissive subjects of bargaining, by allowing the refusal of an employer even to discuss issues of policy that are typically and understandably of enormous concern to professional employees, deters the development of a professional model.

The Supreme Court's decision in *Yeshiva* provides what may be the most striking example of the unfortunate application of the industrial model to professional employment. The majority and dissenting justices in *Yeshiva*, while vigorously disagreeing about virtually every significant issue in the case, all recognized the imperfect fit between the NLRA, a statute designed for the hierarchical and bureaucratic structure of the industrial workplace, and the very different relations typical of colleges and universities. Yet the majority opinion, drawing upon the distinction between employees and managers that arose in industry, seemed to assume that people who exercise substantial influence in the organizations that employ them should not be able to engage in collective bargaining protected by law. The *Yeshiva* decision places in an uncomfortable position professionals attracted to collective bargaining as a means to obtain or support professional values. The decision may force them to choose between no collective bargaining and an industrial model. Many who would want a professional model of collective bargaining might, as a second best alternative, prefer an industrial model to no collective bargaining at all. The *Yeshiva* decision may thereby foster the industrialization of professional work, that paradoxically, it was apparently designed to prevent.

A PROFESSIONAL MODEL OF COLLECTIVE BARGAINING

More creative adaptations of traditional principles of labor law to professional employment could foster a professional model of collective bargaining. Modifications of the principle of exclusive representation could accommodate the desire of most professionals, whether or not they are in unions, to deal directly with their employers on professional matters. Requiring bargaining over all but illegal subjects would allow unions to negotiate more effectively over issues of professional concern. Furthermore, the scholarly differentiation between bureaucratic and professional responsibilities would provide an excellent legal distinction under the NLRA between covered professional employees and excluded managers and supervisors. Such a distinction would respect the key concern about divided loyalties that underlies these exclusions while allowing professionals who do not have financial and other bureaucratic obligations to the organization the right to use collective bargaining as a vehicle for meaningful participation in the development of organizational policies related to their professional expertise.

My suggestion that alternative legal rules should be developed to promote forms of collective bargaining more compatible with the legitimate goals of professional employees is not as dramatic or novel as it may first appear. The provision in the Taft-Hartley Amendments allowing professional employees to form their own unit reflects the recognition by Congress of the unique nature of professional work. The legislative history of these amendments reveals the assumption that the collective bargaining agreements negotiated by units composed exclusively of professional employees would contain many provisions designed to accommodate the distinctive interest of professionals. Subsequent experience suggests that the creation of separate units of professionals may be insufficient and that additional modifications of labor law may be necessary.

The adaptation of labor law developed in the private sector to the special characteristics of public employment during the past two decades suggests that a similar process might work for professional employment. And perhaps a new model of collective bargaining for professionals might apply to other workers as well at a time when many employers and unions in the industrial sector believe that more autonomy and influence at work will increase both job satisfaction and productivity.

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PROFESSIONALS AND THE WORLD OF WORK

B. PROFESSIONALS IN WORK ORGANIZATIONS

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Our interest here is in examining the functioning of professionals in work organizations. It is easy to characterize professions in terms of specialized and extended training, incorporating assessment and leading to a credential, an emphasis on quality performance, a reliance on peer review, a servicing or advising orientation, adherence to a code of ethics, commitment to the renewal of expertise, and membership in an association of similarly credentialed individuals. While the professionals may argue with this characterization, they will likely agree with the assertion that describing the functioning of professionals in organizations is difficult.

This issue didn't arise with Gouldner,[1] but his conceptualizing of a single cosmopolitan — local continuum of role orientations — thirty years ago has been quite influential in defining the study of the relationships of professionals to large, complex employing organizations. Whereas much of the literature on professionals in organizations suggests that the common role orientation consists of a pattern of high professional commitment, external reference group orientation, organizational mobility and limited commitment to organizational goals, recent research (Tuma and Grimes)[2] found these role orientation dimensions empirically as well as conceptually distinct. Of course these dimensions require definition as well as operationalization; with regard to professional commitment, for example, an academician may be intellectually committed to a body of knowledge, or quite alternately he or she may be committed to the social and careerist opportunities provided by a professional association. While role orientations are influenced by early professional training, the opportunities and experiences organizationally and professionally available to an individual will critically affect his or her role definition and enactment. Thus professionals' organizational roles vary extensively across professions and organizations, and they change during an individual's career, perhaps to some degree, according to a common professional life cycle.

An organization, of course, has its own interests and opportunities. To organizations, professionals are expensive, knowledgeable human resources who often work inefficiently while insisting on much role autonomy. Organizational selection, reward systems and leadership culture are mechanisms by which an organization orients its professionals to its interests. That the organization's leaders experienced similar professional training as the members serves to enhance rather than diminish the organization's potential control.

The university is a prime example of a professional bureaucracy, to use the language of Mintzberg's[3] typology of organizations. I would suggest that it is considerably more a bureaucracy of professionals, and others, than a professionalized bureaucracy. Budget power has always defined the allocation of resources within universities. Identified demographic, legal, economic, and socio-cultural forces have caused universities to become increasingly active in finance and marketing and thus to enlarge the scope of centralized administrative vis-a-vis decentralized academic affairs. In Mintzberg's (1979) terms, the operating core or faculty faces a large and powerful combination of other parts of professional bureaucracies, comprised of a strategic apex, middle line management, support staff, and technostructure. To the extent that faculty growth has occurred in vocationally oriented professional programs, e.g. business administration, professional values may have lessened normative constraints against this growth in hierarchial power vis-a-vis professional influence. While much variance undoubtedly exists across higher educational organizations with regard to this issue of increasing bureaucratization, the professional role may not have been much affected in its research and teaching components. Institutional governance and personnel practices probably have been affected more.

With somewhat different objectives and norms, faculty and administrations engage in structural conflict. While this condition is a constant in academe, this conflict can become more institutionalized with the presence of a union. The extent to which this occurs remains an empirical question, but if institutionalization means more distant, impersonal conflict about important, personal terms of employment, this may serve, along with the principle of academic freedom, to shield the research and teaching components of the professorial role from bureaucratic broaches.

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III. INSTITUTIONAL EMPLOYMENT PRACTICES

A. INSTITUTIONAL EMPLOYMENT PRACTICES PERTAINING TO SEXUAL HARRASSMENT

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My presentation focuses on the question of sexual harassment, recent Supreme Court decisions and other kinds of actions that are taking place on campus in response to a heightened sensitivity of the legal, moral, and ethical obligations that arise in a university setting to provide, not only freedom from coercive and unwanted attention, but freedom from a sexually offensive work environment.

There was a recent Harvard study that stated that thirty-two percent of the tenured female faculty, forty-nine percent of those without tenure, forty-one percent of female graduate students, and thirty-four percent of undergraduate females had encountered some form of sexual harassment at least once during their time at the university. There are some insensitive observers who, while expressing support for the eradication of such offensive conduct in the abstract, will pooh actual assertions on the grounds that sexual attention is a very natural part of life and that the ability to deal with such attention is a necessary survival skill. As persons responsible for the employment relationship, we've been told by the United States Supreme Court, in a number of recent decisions, that not only is it a very serious matter but the employer, itself, may be held responsible, even if such activity is consented to by the victim, or even if the employer is unaware of the objectionable conduct.

In June of 1986, the United States Supreme Court issued the landmark decision in Meritor Sav. Bank, FSB v. Vinson 106, S.Ct. 2399 (1986). That case firmly established the principle of employer liability for sexual harassment of employees under Title VII of the Civil Rights Act of 1964. While simultaneously addressing itself to the limit of that liability, the court raised the suggestion that, if taken seriously, could significantly impact on the arbitration process in the EEO field. That suggestion was that the existence of an effective procedure may insulate an employer from liability for sexual harassment. The question we might well ask ourselves is, what is the affect of Vinson on the grievance and arbitration process that we have in most of our collective bargaining agreements.

The court addressed, in this case, three basic issues common to almost all sexual harassment cases. First, is the credibility of the witnesses. Whose version of the facts do we believe? Second, what degree of sex-related conduct will be tolerated? And third, what is the responsibility of the employer? What actions are necessary, required and appropriate?

In Meritor Savings Bank, a female assistant bank manager claimed that her supervisor, a vice-president, made repeated sexual advances resulting in sexual intercourse between them many times over a number of years. On numerous occasions, the plaintiff also charged the vice-president engaged in sexually oriented conduct with her in front of subordinates and other employees. The vice-president and the bank itself denied the plaintiff's allegations. The bank stated that, "...in any event, it should not be liable because it had neither notice nor opportunity to correct the claims of harassment". In the majority opinion authored by now Chief Justice Rehnquist, the court analyzed the situation and found that it constituted an offensive and hostile working environment. It noted further that EEOC guidelines defining sexual harassment did not limit Title VII to economic discrimination but encompassed all terms, conditions, or privileges of employment, including the psychological climate of the workplace.

On the question of how much sex-related conduct will be tolerated, the court held that: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create an abusive working environment."

The court further states that the sexual harassment must be unwelcome in the sense that the plaintiff did not desire that the sex-related conduct take place. The court specifically states that the test is not whether the sex was voluntary but rather, whether it was welcome. On this latter point, and in a controversial statement that we're likely to hear more about, the court said, "that evidence of the victim's conduct, dress, and actions would be relevant toward the credibility dispute of whether the alleged conduct was welcome and hence, not hostile".

The court also addressed the issue of employer's responsibility for a supervisor's alleged conduct. The court rejected a strict liability standard and ruled instead that a common law agency principle should be used. It suggested that an employer will be held liable only if it knew or should have known of the alleged harassment. In discussing employer liability, the court made a comment of interest to labor relations practitioners. The bank had raised the defense that it had internal grievance procedures which the plaintiff had failed to use. This failure, the bank argued, should insulate it from liability because it had no notice and no opportunity to correct the situation. In response, the court said:

> ...we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with the respondent's failure to envoke that procedure, must insulate the petitioner from liability.

Having asked that question, it responds that,

> Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

THE A.C.E. GUIDELINES

The appropriate question then is what is an appropriate grievance procedure? The American Council on Education (ACE) in December of 1986 issued a statement on sexual harassment on campus with suggestions for reviewing campus policy and educational programs. Those of you who are interested in the subject and have not read the ACE guidelines, I recommend them to you. I think they are detailed and offer a pretty good model. The statement presents five key components of effective, preventive sexual harassment campus programs. Those components will make a difference when a court scrutinizes whether the sexual harassment program, coupled with a grievance procedure, will assist in insulating an employer from liability for the unknown acts of subordinates.

1) The first key element is to have a basic definition of what constitutes sexual harassment. That has been an issue that universities have struggled with for the last few years. There has been a significant exchange at Harvard between the dean and a faculty committee attempting to define appropriate conduct. These papers have been geared at the amorous relationships of faculty and students but is equally applicable when talking about administrators and faculty and administrators and students in the work environment.

Those statements, by the way, have gone so far as to say that any amorous relationship between a faculty member and a student, whether or not the student is a student of that faculty member, if not inappropriate, is certainly ladened with many problems for the faculty member as well as the student. The University of Pennsylvania even said that if there is a relationship and sexual contact has taken place, that there will be an assumption that sexual harassment was involved. It could be rebutted by the faculty member, but carrying that burden of refuting that presumption would be very difficult. A number of institutions have taken that strong a position, while others have said that in the absence of a rebuttable presumption, the faculty member is on notice that that kind of conduct is very questionable, if not prohibited.

By contrast, a couple of institutions have addressed the issue through faculty senates or the faculty collective bargaining agent and have refused to adopt those kinds of statements. The University of California, through its academic senate, has refused to adopt such a statement. They have argued that if you make up a list of some kinds of prohibited behavior, you are automatically approving other kinds; and it is difficult to come up with a comprehensive list. Others have said this is a question of professional conduct and members of the profession ought to be the primary judge of what is appropriate and what is inappropriate. There is going to be a lot of discussion with respect to defining what is sexual harassment and the courts are going to ultimately draw their conclusions. A general standard is probably going to emerge through judicial interpretation of what constitutes unwarranted sexual conduct and sexually offensive work environments.

2) The second key element that ACE talks about is a strong policy statement that sexual harassment will not be tolerated. This statement has two effects; one for employees to make them aware that the institution is serious, and two for potential victims to tell them that the institution recognizes their plight and encourages action and remediation — that is reporting and an effort to correct the situation. One should not underestimate the importance of a strong policy statement, in particular, for students who feel sometimes that the entire establishment is against them — that if they make a complaint that nothing is going to happen and they are going to be blamed for it.

3) The third is effective communication. Channels must exist for informing students, faculty, staff and administration about campus policies against sexual harassment. Possible communication vehicles include a freshmen orientation, the fall meeting when faculty come back and staff conferences. The institutional policy regarding sexual harassment should be made clear as well as what procedures are in place.

4) The fourth is the development of educational programs designed to help all members of the community recognize and discourage sexual harassment. I think we are all familiar with situations where people, when confronted with objectionable behavior, express honest shock and surprise that such behavior is not acceptable or would not be tolerated by the institution. Old habits die hard.

5) The fifth and final key element is an accessible grievance procedure providing methods of initiating complaints and procedures to insure that the rights of all parties are protected as much as possible. Complaints must be investigated, taken seriously and resolved promptly. One of the difficulties with a grievance procedure in this area is that ninety-nine times out of a hundred, or at least that is my impression of the cases that I have seen, the most desirable outcome is that the offensive conduct stop. The complainant is not seeking the employment termination, or any other kind of drastic response on the part of the institution toward the other party. Usually that type of action calls for counseling and mediation rather than adjudication of what has taken place.

RESOLVING SEXUAL HARASSMENT CLAIMS THROUGH COLLECTIVE BARGAINING AGREEMENTS

Collective bargaining agreements are interpreted through the actual adversarial setting of grieving a claim, and the consequent results. However, several problems arise when attempting to utilize these mechanisms to resolve sexual harassment claims. Arbitrators do not necessarily have, nor are they always trained in mediation skills. As a consequence, the first question that arises is the collective bargaining grievance procedure itself, as currently constituted, effective in dealing with the mediation aspects that are necessary in the initial steps of sexual harassment grievance. If it is not, you may want to give some consideration to providing either an alternate mechanism or an additional step to the collective bargaining grievance procedure. If you are talking about the employee-employer situation, or something parallel to it, the student-faculty situation, then you might want to add that kind of informal step.

Another difficulty that a grievance procedure in a labor agreement has in dealing with these kinds of issues is the necessity for privacy. It is important that charges are not made public before they are determined to be fully justified. That protects the individual who is being accused of sexual harassment and the student or the employee who does not want to become the center of attention in this regard. There are still those, not only in higher education but in industry and business generally, who believe that someone who makes a complaint of sexual harassment is a marked person and therefore, is someone to be given a wide berth or to be steered away from. It is unfortunate that this mind-set still exists. However, it underscores the importance and necessity for dealing sensitively with these kinds of issues.

Let me conclude my remarks by saying that a number of collective bargaining agreements are now looking at the issue of sexual harassment. There is almost a uniform response on the part of the people who are studying this field to say that this kind of policy, together with the procedure for its remedy, works best when it has the full support of the faculty as well as the administration. That this is an appropriate subject for the bargaining table seems to be clear, however, existing grievance procedures, at least as currently constituted, are inappropriate for resolving sexual harassment claims.

INSTITUTIONAL EMPLOYMENT PRACTICES

B. INSTITUTIONAL EMPLOYMENT PRACTICES PERTAINING TO AFFIRMATIVE ACTION

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THE SETTING

During the past twenty years, institutional employment practices at The City University of New York and elsewhere in higher education have been affected dramatically by the changes in the legal environment outside the University, as well as by demographics and related changes within the University. The attempt to achieve various public policy goals, as articulated in a variety of government enactments, has superimposed conflicting pressures upon those responsible for the recruitment and retention of faculty and staff in institutions of higher education. The policies at issue involve affirmative action, rights of the handicapped and the aged, and policies arising out of the various civil rights statutes prohibiting discrimination in employment.

Some of the problems facing the universities as a consequence are generational. Older tenured faculty, whose careers spanned a time when these policies, if they existed at all, did not affect higher education, were accustomed to functioning in an era when faculty judgments about appointments, reappointments, tenure, and promotion were virtually free of challenge. Neither legal constraints nor constraints imposed by the presence of collective bargaining were part of the faculty decision-making process.

The world has changed. A new group has entered the University — a more diverse group of faculty containing a significant representation of women and minorities — bringing with it different attitudes and beliefs, as well as new concerns. Unionization has introduced a new element in the faculty governance process. One now finds, in The City University and in other unionized universities, the traditional elected faculty governing bodies and the local union chapter often speaking to the same issues. In some colleges, the union has, in essence, taken over the faculty governance body. The same people dominate the governance structure and the union chapter, often changing their roles whenever convenient. Accordingly, institutional employment practices have necessarily changed.

THE CITY UNIVERSITY OF NEW YORK

These developments are dramatically displayed at The City University of

New York, the third largest University in the nation. The City University, during a period of fewer than two decades, has undergone a dramatic transformation that has led to far-reaching changes in institutional employment practices. The University saw a period of pronounced expansion as a consequence of the "Open Admissions Policy" adopted in 1969. Faculty and staff were added in significant numbers in response to large increases in the number of students. Concomitantly, faculty and instructional staff unionized, with the first collective bargaining agreement becoming effective in 1969. The extraordinary expansion continued until 1974 when the harbingers of the city's fiscal crisis appeared. During this epoch, the Uiversity pioneered in the initiation of an affirmative action policy affecting the recruitment of faculty and staff. Also initiated was the Melani[1] class action lawsuit on behalf of the female members of the instructional staff, in which the representatives of the class charged that females had been discriminated against in a variety of terms and conditions of employment.

LEGAL AND LEGISLATIVE GUIDELINES

The 1975-1976 period brought additional upheaval, the city and state fiscal crises resulted in the imposition, for the first time, of tuition for city resident undergraduate students and a sharp reduction, almost overnight, in the University's budget. During the summers of 1975 and 1976, a large number of the instructional and classified service staff were "retrenched". Retrenchment meant that offers of appointment for the following year that had already been made were withdrawn because of financial exigency. Of the instructional staff retrenched, significant numbers were minorities who had been recruited during the early 1970s as a consequence of the expansion following open admissions and the University's affirmative action policies. The University's faculties, therefore, suddenly aged, and became heavily tenured and considerably less diverse. They looked more like the faculties of the late 1960s than those of the first half of the 1970s.

By the end of the 1970s, a more stable era began with budgets improving slowly. In 1979, legislation transferred responsibility for the funding of the senior colleges of the University to the state. The faculty and staff gradually grew, as did the number of minorities and women, and in most of the colleges the number of students began to increase. Thus, in 1987, the University has approximately 183,000 students and 30,000 full- and part-time staff, numbers which have not changed significantly during the past few years.

The array of institutional employment policies under which the University operates today arises out of the several federal and state statutes passed in an effort to guarantee full employment opportunity for all. Included are Title VII of the Civil Rights Act of 1964, as amended, the affirmative action programs established under Executive Order #11246, as amended, the Age Discrimination in Employment Act, the Occupational Safety and Health Act of 1970 and related state statutes, and Sections #503 and #504 of the Rehabilitation Act of 1973, as well as the 1986 amendment to the Age Discrimination in Employment Act.

Because of The City University's history and mission, the diversity of the University's faculty and staff, and the breadth of its student populations and programs, as well as the presence of unionized faculty and staff, and, perhaps, the litigiousness of New Yorkers, The City University has been in the forefront in developing and implementing policies related to equal employment opportunity, affirmative action, and the disabled. These policies have challenged the faculty and staff of the University, created discord, and, upon occasion, have been at variance with one another. The faculty and staff recruited prior to the implementation of the new policies have been forced to confront changes that have challenged traditional practices.

Given the timeliness of recent Supreme Court decisions, this paper will consider, in particular, two of the University's institutional employment practices that have far-reaching effect — affirmative action and the protection of employees with disabilities.

AFFIRMATIVE ACTION

The City University has had a forceful affirmative action policy since the early 1970s, a policy which was reaffirmed by recent actions of the Board of Trustees, as well as by the consent decree, which settled the Melani class action lawsuit. The affirmative action policy has forced the faculties to broaden their recruitment efforts and vigorously seek out qualified minority and female applicants for faculty positions. It has challenged the "old-boy" network and the tendency of many faculty departments to recruit by the least demanding method, that is, by recruiting adjuncts already in the department or by limiting recruitment efforts to known sources such as local universities with graduate programs that have already yielded many of the faculty in the department. The challenge of overseeing an affirmative action program has been to make clear that the requirements of affirmative action are, in fact, consistent with the ostensible desire of faculties to seek to recruit and retain the best possible faculty through the widest possible search for qualified candidates. Affirmative action has challenged lazy recruitment practices and has proved most threatening to faculty who are themselves mediocre and do not wish to see their situations disturbed by bright, energetic, and more diverse faculty entering their departments and schools.

The role of most faculty unions in relation to affirmative action can best be described as ambivalent. Although publicly supporting the principles of affirmative action, these unions, by the nature of their roles, must defend the status quo and, in fact, do so. By seeking to restrict the flexibility of the colleges, they serve as a constraint upon vital change.

The validity of aggressive affirmative action programs has been under considerable challenge for a number of years, both through attacks upon the programs themselves and through reverse discrimination law suits. The past year has provided us with a line of decisions by the United States Supreme Court, beginning with Wygant v. the Jackson, Michigan Board of Education,[2] Fire Fighters Local 93 v. City of Cleveland,[3] The Sheetmetal Workers Union Local 28 v. The EEOC,[4] and United States v. Paradise,[5] and concluding with the definitive March 25, 1987 decision — Johnson v. Transportation Agency, Santa Clara County, California.[6] Although in some ways these cases are superficially contradictory, they have consistently defined the proper manner in which affirmative action programs are to be conducted. The underlying principle which has been articulated is that the appropriate measure of an institutional work force is the appropriate marketplace or labor pool representation of women and minorities. Evidence of under-utilization, that is, representation of women and minorities at levels below their presence in the relevant marketplace or labor pool, makes it acceptable to establish goals and timetables which are remedial and realistic.

The Johnson decision unambiguously upheld voluntary affirmative action plans. The court upheld the affirmative action plan of a county transportation agency which allowed a qualified woman to be promoted to the "skilled craft" position of road dispatcher in place of the male complainant who had scored slightly higher on the qualifying examination. The county had no women in the title. Justice Brennan, delivering the opinion of the court, noted Title VII's purpose of eliminating the effects of employment discrimination. Justice Brennan states:

> The first issue is therefore whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories". In determining whether an imbalance exists that would jusify taking sex or race into account, a comparison of the percentage of minorities or women in the employers' work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise.... Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.

Justice Brennan proceeded to opine that an affirmative action plan which merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants is acceptable when one is seeking to further an affirmative action plan designed to eliminate work force imbalances. The opinion endorses a moderate, gradual approach to eliminating the imbalance in a work force, one which establishes realistic guidance for employment decisions and causes minimal intrusion in the legitimate expectation of other employees.

The Johnson decision thus explicitly finds an affirmative action plan, based upon a work force utilization analysis that results in goals and timetables, to be acceptable. It permits affirmative action considerations to be one of the valid factors used in assessing the credentials of qualified applicants for a position. The decision validates the affirmative action plans that have been in effect for a number of years at The City University and many other institutions of higher education, and it should reduce significantly the number of reverse discrimination complaints.

One could argue that Johnson presents an extreme fact situation which may easily be distinguished from other cases. Johnson, however, is the last of a series of affirmative action cases that have addressed the issues at length and have occupied much of the court's time, and it is unlikely that other guidance will soon be forthcoming. The language of Johnson, therefore, must serve as the appropriate guide.

In 1986, an amendment to the Age Discrimination in Employment Act eliminated mandatory retirement as of the end of 1993 for tenured faculty. This amendment, strongly supported by many unions, created a conflict with the goals of affirmative action which seek to create a more diverse work force, because it allows and encourages current faculty to remain in place for an indefinite period of time. The strong union support for the Age Discrimination in Employment Amendment again reflects the contradictory position of the unions which desire to protect the rights of the incumbents even when there is a conflict with other institutional goals, including the need to offer changing educational curricula and to achieve affirmative action goals. The anticipated significant numbers of new faculty positions becoming available after 1995, primarily as a consequence of anticipated retirements, may alleviate the problem if, as has been the case up until now, most faculty continue to retire before the age of 70.

PROTECTION OF EMPLOYEES WITH DISABILITIES

On March 3, 1987, the Supreme Court spoke with some definitiveness in the area of protected employment disabilities. The case of School Board of Nassau County, Florida v. Arline[7] resolves some longstanding issues involving Section 503 of the Rehabilitation Act of 1973. Ms. Arline, an elementary school teacher, was hospitalized for tuberculosis in 1957. The disease went into remission for 20 years, but she had three relapses during 1977 and 1978. She was discharged after a hearing in 1979 because of the continued recurrence of tuberculosis.

The opinion of the court, also written by Justice Brennan states:

> It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.

The opinion notes that Congress had amended the Act to include within the definition of a handicapped person not only those who are actually physically impaired, and, as a result, are substantially limited in a major life activity, but also those who are regarded as having a physical or mental impairment. Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

> Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.... The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.... The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases.

The court concluded that the fact that a person with a record of a physical impairment is also contagious does not remove that person from coverage under Section 504.

The court thus reduced the question to whether the employee is otherwise qualified for the job of elementary school teacher. The answer, the court stated, will require that the District Court conduct an individualized inquiry and make appropriate findings of fact:

> Such an inquiry is essential if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

The court further observed at footnote 16:

> A person who poses a significant risk of communicating an infectious disease in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children.

THE ISSUE OF "AIDS"

The unpublished case of Thomas v. Atascadero Unified School District,[8] decided November 17, 1986 in the United States District Court for the Central District of California, is the first ruling by a federal court determining that AIDS is a handicap under the Federal Rehabilitation Act.

The Arline decision, and the Thomas decision which it preceded by several months, raise a number of important questions for higher education. Every major employer in the United States will soon have to develop a policy that addresses the problem of employees with AIDS and AIDS-related conditions. By 1991, the Center for Disease Control in Atlanta estimates that nearly 100,000 people will be living with the disease, and that as many as 10 million people may also be carrying the virus, even though they show no symptoms. In spite of the current intense research effort to seek a method of either preventing or controlling AIDS, significant results are not likely to be achieved in the near future. It is frightening to reflect that if AIDS had struck in the early 1970s, before the recent advances in molecular biology, medical science would have been as helpless as it was 400 years ago when a syphilis epidemic left 10 million dead in Europe.

For higher education, the AIDS issue is exceedingly complex. In addition to dealing with employees, including faculty who contract AIDS, universities must contend with the issues affecting their medical, nursing, and other health-profession students assigned to treat AIDS patients, as well as those involving patients treated by staff or students who may have the disease. One veteran teaching hospital physician has observed that the new generation of doctors, nurses, and other health-care practitioners entered the field at a time when, prior to AIDS, the issue of infectious diseases had essentially disappeared and that they have, consequently, lost sight of the fact that the health professions are historically high-risk occupations.

Colleges will also have to grapple with broader issues regarding AIDS, including whether to allow students with AIDS to remain in school, and the treatment of students with AIDS who are living in dormitories. These questions, to which there are no easy answers, raise issues not only under the Rehabilitation Act, but also issues affecting privacy and the public welfare. In regard to employees who are not working in fields such as medicine or dentistry, in which they are in contact with patients or others in circumstances that could provide for the transmission of the disease, universities would probably be well advised, in most circumstances, to permit employees to continue working for as long as they are able. For situations involving employees in particular jobs that could result in transmission of the disease in circumstances in which reasonable accommodation could not be made, individual determinations to discontinue active employment would have to be made based upon sound medical judgment.

The issues affecting universities in regard to protected disabilities seemed innocuous a few years ago. With the advent of AIDS, they now take on a completely different scope and magnitude. A goal of any employer is to provide a safe work setting for all employees. With AIDS, which is not a casually contagious disease and for which there is little risk of transmission in the normal setting of the work place, the issues should be relatively simple. Given the emotional fear that AIDS inspires, however, there is a need to prepare and educate both management and employees before a crisis erupts. As long as employees with AIDS are able to meet acceptable performance standards and their condition is not a threat to themselves or others, they should be treated like other employees. If warranted, reasonable accommodations for the employee, such as flexible work hours or changes of assignment, should be made as long as these do not hamper the operation of the work unit. The fact remains, however, that some employees will be uncomfortable with their co-worker's life-threatening illness, particularly when it engenders fear. The role of the unions will be crucial, and they will have to take a responsible position and assist in the education of their membership.

The issues involving employment discrimination and protected disabilities as they affect higher education are complex. The questions are, as always, easier to formulate than are the solutions.

FOOTNOTES

1. *Melani v. Board of Higher Education of the City of New York*, 73 Civ. 5434 (LPG) S.D.N.Y.
2. *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, *reh'g denied*, 106 S.Ct. 3320 (1986).
3. *Local 93, Int'l Ass'n of Fire Fighters v. City of Cleveland*, 106 S.Ct. 3063 (1986).
4. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019 (1986).
5. *Unites States v. Paradise*, 107 S.Ct. 1053 (1986).
6. *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987).
7. *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987).
8. *Thomas v. Atascadero Unified School District*, Civ. No. 88 6609 AHS (BY) (C.D. Cal. November 17, 1986).

INSTITUTIONAL EMPLOYMENT PRACTICES

C. INSTITUTIONAL EMPLOYMENT PRACTICES PERTAINING TO ISSUES OF PRIVACY

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I. FACULTY PRIVACY RIGHTS

Often described as the "right to be left alone" the right to privacy, while not expressly guaranteed by the Constitution, is widely recognized as a significant, but sometimes elusive, constitutional right. It stems generally from the First and Fourth Amendments to the Constitution. As a general rule, this right protects against unwarranted governmental intrusion into one's own private affairs. However, the constitutional right to privacy offers no protection against intrusions into one's private affairs by non-governmental actors. Thus, with some exceptions, faculty at private institutions are not constitutionally entitled to protection against intrusions into their private affairs by their employers.

Where the U.S. Constitutional protections do not extend to private actions, state constitutional provisions and state statutes may offer similar (or better) protection.

As a general rule, a governmental employer may not require an employee to waive or give up a constitutional privilege as a condition of continued employment. Moreover, "a waiver secured under threat of substantial economic sanction cannot be termed voluntary." Lefkowitz v. Turley, 414 U.S. 70 (1973).

On the other hand, a private employer can require its employees to relinquish certain rights in order to obtain or maintain employment. Thus, workplace testing requirements, access to files and office searches can be subjects of collective bargaining agreements.

II. CONFIDENTIALITY IN THE PEER REVIEW PROCESS

A. Peer Review Process — An Overview

The peer review process has variously been described as "the heart of academic decision-making"[1]; "a traditional freedom, essential to colleges and universities"[2]; and "the very lifeblood and heartbeat of academic excellence"[3]. The peer review system of faculty evaluation is well entrenched in the university system.[4]

B. Need to Know vs. Confidentiality

Disputes over access to faculty personnel files typically result from the individual faculty plaintiff's need to acquire evidence to sustain his/her claim which clashes with the institution's need to preserve the traditional confidentiality of the peer evaluation.

Litigation in this area typically involves one or all of the following issues: access to the materials in one's own personnel file; compelled disclosure of the confidential materials which are generated and used in the evaluation process but not necessarily placed in the candidate's personnel file; and compelled disclosure of the personnel files of other faculty.

1. Access to Candidate's Own File

There is no recognized constitutional right of access to one's own personnel file. The right of access is usually created by state law (and sometimes by the state's constitution). Probably the most common sources of access are the various Freedom of Information or Open Records laws which typically guarantee certain employees of the state and its agencies the right to review and obtain copies of their personnel files. Because these statutes generally apply only to public employees, faculty at private or independent institutions may not have a statutory right of access to their personnel files.

The right of access may also be granted by the employer either through a collective bargaining agreement or by its policies and faculty handbook. For example, the West Virginia University Faculty Handbook provides that "faculty members are free to see their own files during regular office hours and need offer no reason to do so". Conversely, some institutions may retain the authority to deny access to personnel files either through collective bargaining agreements or contracts with its employees.

Litigation over employees' requests for access to their files has produced mixed results. The following are some of the cases in which the issue has been confronted:

a. Access Granted

In Gray v. Board of Education, 692 F.2d 901 (2d Cir. 1982) the Second Circuit held that the plaintiff faculty member was entitled to disclosure of materials in his file because he had received no statement concerning the reasons for his dismissal. The Fifth Circuit in Jepsen v. Florida Board of Regents, 610 F.2d 1379 (5th Cir. 1980) similarly held that because the institution had relied on the tenure materials in the plaintiff's file in its defense, the plaintiff was entitled to them.

b. Access Granted Conditionally

In Lynn v. University of California, 656 F.2d 1337 (9th Cir. 1981) the plaintiff was permitted to obtain access to her complete file but only because the University had already offered part of the file materials into evidence.

c. Access Denied

The court in McKillop v. University of California, 386

F.Supp. 1270 (N.D. Cal. 1975) denied the plaintiff access to materials in her own tenure files upon the University's assertion of federal and state privileges.

There is currently pending in a California state court, litigation challenging the University of California's confidential system of tenure review. Among other changes in the University of California peer review system, the plaintiffs are seeking full access to their files, the texts of the peer reviews and names of the peer reviewers, and the right to include rebuttal to any information in their files.

2. Access to Confidential Materials Generated and Used in the Evaluation Process

Litigation in this area has typically involved faculty plaintiffs who have attempted to gain access to those materials and information which are generated and used in the evaluation process but which are not necessarily placed in their personnel file. Perhaps the leading case in this area is In Re Dinnan, 661 F.2d 426 (11th Cir. 1981), cert. denied, 457 U.S. 1106 (1982). In this case arising out of a discrimination claim against the University of Georgia, the plaintiff sought the court's assistance in compelling the testimony of Professor Dinnan, a member of the college promotion review committee. Professor Dinnan refused to answer questions about his vote on the plaintiff's promotion and tenure. The district court ordered Dinnan to pay a fine and serve a ninety-day jail term for contempt.

The 11th Circuit affirmed the order and refused to protect Dinnan with the academic freedom privilege he claimed. The court held that Dinnan and the University of Georgia were not above the public policy of the United States which prohibits discrimination. It further found that "(t)o rule otherwise would mean that the concept of academic freedom would give any institution of higher learning carte blanche to practice discrimination of all types," 661 F.2d at 431.

In the Gray case discussed above, the University was also compelled to disclose the votes of the members of the tenure review committee; however, in so doing, the court implied that it would have considered the information privileged had the University given Gray a statement of reasons for the denial of tenure.

3. Compelled Disclosure of the Personnel Files of Other Faculty

The cases in this area usually involve requests from faculty plaintiffs and "agency plaintiffs" for access to other faculty files. The case law on compelled disclosure of confidential peer review materials is quite unsettled and the U.S. Supreme Court recently sidestepped the opportunity to resolve some of the conflicting decisions when it declined to grant a writ of certiorari in Franklin and Marshall College v. EEOC, 775 F.2d 110 (3rd Cir. 1985), cert. denied, 106 S. Ct. 2288 (1986).

In Franklin and Marshall, the Equal Employment Opportunity Commission subpoenaed all of the tenure review materials from the files of every faculty member who had been considered for tenure over a four-year period. The college resisted the subpoena asserting an academic privilege. The district court required Franklin and Marshall to comply with the subpoena.

On appeal, the 3rd Circuit affirmed the district court order, refused to recognize a qualified academic privilege and declined to adopt a balancing approach to resolving the discovery dispute.

Most recently, in Dixon v. Rutgers, 521 A.2d 1315 (N.J. Super 1987) in the context of a discrimination claim, the court held that the academic freedom privilege did not protect confidentiality of material contained in promotion packets of faculty members at the University. The court permitted the evidentiary use, with certain protective restrictions, of the confidential peer review material which included confidential letters of recommendation from sources outside the university. The court found that because the individuals being evaluated could have access to their own packet (except for the outside letters of evaluation) the peer reviewers were not operating under an assumption of strict confidentiality. The court further held that because the materials were available to Rutgers to demonstrate the claimed nondiscriminatory reason for rejecting the plaintiff's promotion, the confidentiality did not require their exclusion as evidence. The court concluded that "(t)o preclude the evidentiary use of this material would require Dixon to chase an invisible quarry".

4. Balancing the Interests — Standards for Disclosure

In reviewing requests for access to peer review information, the courts typically use a constitutional analysis and balance the interests of the plaintiff — the need to acquire evidence for the claim — against the institution's assertion of an academic privilege grounded in the First Amendment — on a case-by-case basis to determine whether disclosure and/or access is appropriate.

The 7th Circuit has held that persons requesting access to confidential peer review materials must demonstrate a "particularized need" in order to be entitled to the materials, see EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 338-39 (7th Cir. 1983). However, the 3rd Circuit in Franklin and Marshall declined to even engage in a balancing test in weighing the EEOC request for all tenure materials. Until the Supreme Court takes the "next case" the issues will remain unresolved.

5. The Possible Effects of Opening Up the Peer Review System

A. Less Candid Reviews

A key element in the peer review process is the assurance given to reviewers that the materials generated in the process will remain confidential. Without such an assurance, many predict that evaluations would be less candid and, therefore, be virtually meaningless. The following excerpt of a letter from an outside peer evaluator is illustrative of the dilemma created when confidentiality cannot be assured:

> I want to make it perfectly clear that this is a confidential assessment, and is not to be regarded otherwise. If it should turn out that your attempt to maintain confidentiality breaks down, then you must delete this letter from your file and make no

> further use of it. If you then wish support from me in the form of a letter than can be shown to the candidate, then you should write to me again asking for me to put on paper a suitably bland version of my opinion of the case. I take it, however, that what you are asking for at the moment is a really thorough and frank assessment which it would, in my view be quite inappropriate to give to the candidate, and I want you plainly to understand that you are in no circumstances to do that.[6]

B. Abandonment of Formal Evaluation Processes for Informal, "Underground" Evaluations

Some commentators predict that if assurances of confidentiality in the peer review processes cannot be made or met, the formal process will be so ineffective that it will be abandoned in favor of an informal system of evaluation which relies on informal conversations and oral evaluations.[7] These predictions do not appear to be far off the mark. One evaluator who was advised that a faculty candidate might have access to his evaluation candidly responded:

> I must admit that... (the potential access) seriously disturbs me. In fact, I have stopped refereeing proposals for (another university) since they adopted a policy similar for reports. It would be absolutely inadequate merely to remove my "name and affiliation" from any fully frank and honest letter, since my identity could be easily reconstructed by any person moderately familiar with the field. The potential embarrassment would be all the greater if frank opinions, not only of the candidate but also of others in the field were to be embodied in the letter... I realize that this letter may look a little "thin" to you and your colleagues but I think you will at least understand my reasons. We could, of course, discuss the issue by telephone if you would like.[8]

The ACE Self-Regulation Initiative on Confidentiality concludes that:

> (w)ithout the assurance of confidentiality, higher education may risk a revival of appointment and advancement processes that rely primarily on informal conversations and oral evaluations which are a potentially deeply-discriminatory means of evaluation that current promotion and tenure processes and public laws are, in fact, intend to expunge.[9]

C. Exposure to Defamation Actions

Another possible effect of opening up the peer review system is an increased risk of exposure to defamation actions. As a general rule, statements made or written in the course of an evaluation are protected by an absolute or conditional privilege. An absolute privilege protects the communication regardless of the motive or intent of reasonableness of the defendant in making the statement. A conditional privilege protects the communications when they are made in good faith and in the performance of duties, see Leibowitz v. Szoverkly, 436 N.Y.S.2d 451 (1981).

Most defamation actions brought by faculty have not been successful because of the protection offered by the conditional privilege. This conditional privilege may be lost if the peer review materials are disclosed to persons outside the peer review process.

III. ADMINISTRATIVE SEARCHES OF FACULTY OFFICES

Another area in which institutional employment practices and an individual's privacy rights may clash is in the area of administrative searches. In O'Connor v. Ortega, 54 U.S.L.W. 4405 (March 31, 1987) the U.S. Supreme Court held that the privacy rights of public employees extend to their offices but employers can search offices, desks and files without warrants in certain circumstances.

The majority of the court in the 5-4 opinion by Justice O'Connor rejected the Justice Department's position that public employees cannot expect the same privacy rights in their offices as other workers. Instead the court held that the scope of the public employees' rights must be determined on a case-by-case basis and the search must be related to a "reasonable" purpose and not be unnecessarily intrusive.

The government's authority to conduct warrantless searches is limited by the Fourth Amendment which protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...". In reviewing whether a particular search was reasonable, the courts first determine whether the individual had a reasonable expectation of privacy in the place that was searched. In Ortega, the court held that:

> (i)ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Id. at 4408.

Thus, the employer's legitimate regulations or actual office practices and procedures may operate to reduce the employees' expectations of privacy in their offices.

In this particular case, the Court held that Dr. Ortega did have reasonable expectation of privacy at least in his desk and file cabinets. The Court then held that the appropriate method of analysis to determine the reasonableness of the search would have been to balance the invasion of the employee's legitimate expectation of privacy against the employer's need for supervision, control and the efficient operation of the workplace. Id. at 4408.

The court declined to require that the decision to search must be based on "probable cause"; rather the court decided that a "standard of reasonableness that stops short of probable cause" would be appropriate in these circumstances. Thus public employers may conduct warrantless searches of their employees' workplaces so long as the decision to search was reasonable. Accordingly, the court gave public employers "wide latitude to enter employee offices for work-related, non-investigatory reasons". Id. at 4409. The court further held that searches conducted pursuant to an investigation of work-related employee misconduct must also meet a reasonableness standard. Id. at 4410.

The Court declined to determine whether the search of Dr. Ortega's office met the standards of reasonableness articulated in the case; instead, the Court remanded the matter for further development of the facts surrounding the employer's justification of the search in question.

The implications of the Ortega case are several-fold. The U.S. Supreme Court has clearly upheld the privacy rights of public employees. At the same time, however, the Court has affirmed the employer's right to regulate the workplace by permitting it to engage in warrantless work-related searches as long as the searches are reasonable. Little guidance is provided for determining what constitutes a reasonable basis for a workplace search. After Ortega, the public employer is given fairly wide latitude to determine when a search of an employee's office is justified. The decision also seems to condone workplace regulations which establish routine work-space searches. Whether these same privacy rights will extend to protect public employees from other governmental intrusions such as drug-testing remains to be seen.

IV. TESTING IN THE WORKPLACE

A. In General

Testing of employees, the institutional employment practice that has received the most media attention in recent years, is probably not just coincidentally the practice that has the greatest potential for causing the most serious intrusions on the faculty member's privacy. Many employees are now routinely tested for drug and alcohol use; some employers also administer pre-employment psychological and polygraph tests. Other employers, including colleges and universities, have indicated that they may begin to test certain employees for exposure to the AIDS virus.

B. Drug Testing

Presidential Executive Order 12564 (signed and effective September 15, 1986) requires Federal agency heads to institute drug testing programs for employees in "sensitive" positions. Under the executive order, agency heads are also authorized to test other employees for drug use where there is a "reasonable suspicion" that the employee uses illegal drugs.

Proposed legislation in Utah would permit drug and alcohol testing of new employees in the private workplace; the bill would further provide for indemnification of employers from liability as long as the testing was performed under "reasonable assurances". Legislation in Tennessee would require drug testing of all students attending Tennessee state colleges and universities, and would prohibit anyone from entering college whose tests showed drug usage.

These executive and legislative actions have not gone unchallenged. The American Federation of Government Employees (AFGE) recently filed suit challenging the implementation of the federal drug testing guidelines. The AFGE charges that the guidelines violate the constitutional guarantees to privacy and due process.

Last December, the National Treasury Employees Union obtained an injunction against the U.S. Customs Service's employee drug testing program, see NTUE v. Von Rapp, 55 U.S.L.W., 2170 (E.D. La. 1986) (appeal pending).

The courts have consistently held that the taking of blood and urine specimens is a "search" within the meaning of the Fourth Amendment. The real issue before the courts in the drug testing cases is the reasonableness of the search. Again, the courts apply a balancing test to weigh the employees' interests in privacy against the employers' interests in maintaining a safe and efficient (and drug-free) workplace. The results to date have been uneven. It appears, however, that the courts will be more sympathetic to drug testing of employees who hold sensitive positions or positions which have a direct impact on the general public's health and safety.

C. Polygraph Examinations

Many states now, by statute, prohibit an employer from requiring a polygraph examination as a condition of employment or continued employment, see, e.g., Mass. Gen. Laws ch. 149 Section 19(b) (1985). Federal legislation restricting the use of polygraphs both in public and private employment may be forthcoming.

D. Psychological Testing

The primary concerns in this area stem from the employers' unauthorized disclosure of the results of psychological testing, treatment or counselling.[10] Two recent cases are illustrative of the problems which can result from unauthorized disclosures. In Eddy v. Brown, No. 62086, Okla. Sup. Ct. (1986), the plaintiff brought an invasion of privacy claim against his foreman, supervisor and employer for their disclosure to several of the plaintiff's co-workers that the company doctor had prescribed "mood elevators" for the plaintiff and had recommended that he have a psychiatric evaluation. The court held that since "only a small group of co-workers were made privy to the (plaintiff's) private affairs" there had been no public disclosure of private facts and therefore no invasion of privacy.

A contrary result was reached by the court in Bratt v. IBM, No. 85-1545, (1st Cir. 1986) another invasion of privacy case. In Bratt, the plaintiff confided in his supervisor about some physical problems he was experiencing because of job-related problems. The supervisor arranged a doctor's appointment; the doctor conducted a physical examination of the plaintiff and determined that he was paranoid. The doctor informed the supervisor of his conclusion and recommended that the plaintiff see a psychiatrist. The supervisor reported this information in a memorandum to an IBM vice president.

The plaintiff received a medical leave. Upon the expiration of that leave he was placed in a temporary assignment at a new IBM facility. He did not receive a permanent position after his medical leave and filed three invasion of privacy claims.

Two of the claims related to his medical treatment. One alleged that IBM had violated his right to privacy by distributing a memorandum which contained the physician's conclusion that the plaintiff had a mental problem. The second claim alleged that IBM violated his privacy by discussing his medical problems with his physician without first obtaining a signed release authorizing disclosure.

The federal court, applying Massachusetts law, balanced the competing interests and determined that IBM had not violated the plaintiff's privacy rights by distributing the memorandum containing the physician's conclusion on the plaintiff's mental condition because the disclosure was reasonable in light of the fact that the managers who received the memorandum had a legitimate interest in knowing of the plaintiff's possible mental problems because they were involved in evaluating the grievances the plaintiff had filed.

The court did, however, find that IBM may have violated the plaintiff's right to privacy by allowing IBM personnel to discuss the plaintiff's medical problems without obtaining the plaintiff's authorization. It recognized an already existing expectation of privacy concerning such information, which was enhanced by a company policy which protected the confidentiality of this type of medical information.

These conflicting cases illustrate the difficulty in predicting the outcome of invasion of privacy claims in this area. As a general rule, the courts will again engage in a balancing test to weigh the employee's legitimate expectation of privacy against the employer's asserted business need for use of such tests and the disclosure of the results of the tests. Disclosure of the results of physical examinations implicate the same privacy concerns and are typically resolved using the same balancing of the interests test.

E. Testing for the AIDS Virus

Of all the issues in employee testing, testing for the AIDS virus probably provokes the most emotional response and presents some of the most difficult legal questions for employers. In addition to the "usual" legal issues surrounding medical records and privacy, issues unique to AIDS arise when the employer requires its employees to submit to such tests. The legal issues presented by AIDS testing plans are compounded by the fact that the medical information about AIDS is changing daily, and as new knowledge is acquired, the employer's responsibilities and the employees' rights are reshaped.

The privacy issues presented by testing for AIDS are multi-dimensional and can only be presented as questions, because the answers are far from being legally (and morally) clear. The primary privacy issue for the employee is whether the employer may compel him/her to be tested for AIDS, or in other words, does an employee have the right to refuse to learn whether he or she has been exposed to or carries the AIDS virus? If an employee tests positive for AIDS, may the employer inform co-workers of the affected employee's test results? Must affected employees accept alternative work-assignments? May co-workers refuse to work wth AIDS infected workers? If an employee who has been tested positive for AIDS refuses to inform his/her spouse or partner of the results, does the employer have the right (or obligation) to do so?

Where, as in testing for AIDS, the privacy issues deal with the intimate details of one's sexual practices, the courts are likely to be more protective of the individual employee's privacy concerns and to require a stronger than usual showing by the employer that such testing is substantially related to a legitimate business purpose and is necessary to address the public health concerns.

FOOTNOTES

1. Chronicle of Higher Education, March 18, 1987, at 16.

2. Brief of 67 Colleges and Universities as Amici Curial in Support of the Petition for a Writ of Certiorari in Franklin and Marshall College v. EEOC, at 9.

3. EEOC v. University of Notre Dame Du Lac, 751 F.2d 331 (1983).

4. See, brief of 67 colleges, supra at 5 which traces the history of peer review back to 1231 and the "rise of the university in medieval times".

5. Chronicle of Higher Education, March 18, 1987, 16-17.

6. Reported in Smith, "Protecting the Confidentiality of Faculty Peer Review Records: Department of Labor v. The University of California," 8 Journal of College and University Law 20, 22 (1981-82).

7. American Council on Education, Self-Initiatives: Confidentiality of College and University Faculty Personnel Files: Its Approrpriate Role in Institutional Affairs.

8. Smith, supra, note 6 at 28 n. 31.

9. ACE, supra, note 7.

10. An institutional employment practice of using psychological testing to screen applicants may run afoul of Section 504 of the Rehabilitation Act of 1973 if the result of such screening is that it excludes otherwise qualified applicants whose tests disclose a handicap covered by the Act.

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IV. LIFE CYCLE—STEP ONE: RECRUITING AND HIRING THE PROFESSOR

A. PREFERENTIAL TREATMENT IN FACULTY CAREER OPPORTUNITIES: A LEGAL ANALYSIS

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EXECUTIVE ORDERS, FEDERAL REGULATIONS AND STATUTORY PROVISIONS

It is often forgotten that the notion of requiring government contractors to take affirmative action not to discriminate against a discrete group of persons in employment originated when President Roosevelt in 1941 issued Executive Order 8802, 3 CFR 957, mandating nondiscrimination in employment by defense contractors. Best known is Executive Order 11246, issued in 1965 by President Johnson as an adjunct to the Civil Rights Act of 1964, and subsequently amended by Executive Order 11375, which requires that every nonexempt federal government contract must contain an equal opportunity clause, provisions that require contractors and subcontractors not to discriminate against employees and applicants on the basis of race, color, religion, sex or national origin, as well as requiring them to take affirmative steps to ascertain that such factors play no part in employment decisions.

The Executive Order is implemented by federal regulations. 41 CFR 60-1.1 directs government contractors and contracting agencies to institute certain procedures designed to ensure compliance with the Executive Order. These regulations apply to all agencies of the federal government administering programs involving federal financial assistance; hence, they are applicable to all educational institutions receiving federal funds. The employee selection process is affected by a number of federal regulations, all found in Title 41, Code of Federal Regulations. For example, Section 60-1.41 provides that any advertisement for employees shall either identify the employing agency as an equal opportunity employer, or shall state expressly that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin. Section 60-2.21(b)(1) urges the employer to inform all recruiting sources verbally and in writing of its equal employment opportunity policy, and should stipulate that these recruiting sources actively recruit and refer minorities and women for all positions listed. Under Subsection (4), the employer should tell prospective employees that the employer has in existence an affirmative action program and should instruct the prospective employee on how to benefit from it. The Uniform Guidelines on Employee Selection Procedures contained in Section 60-3 require covered employers to establish standards for validation of selection procedures to ensure that they do not have an adverse impact on members of a protected class.

A narrow exception to the equal opportunity directive is found in Section 60-1.5(a)(5), which allows religiously-oriented, church-related colleges and universities to hire employees of a particular religion only. There appears to be no similar exception with regard to race, color, sex or national origin.

In addition to Executive Orders and federal regulations implementing them, various federal and state laws require equal opportunity in employment, including hiring. Title VII of the Civil Rights Act of 1974 makes it illegal for an employer to fail or refuse to hire because of an individual's race, color, religion, sex or national origin. 42 U.S.C. §1983 provides a cause of action against a public employer acting under color of state law to deprive an individual of rights secured under the U.S. Constitution, such as the rights to due process and equal protection of the laws. Other federal statutes such as the Equal Pay Act and the Age Discrimination in Employment Act prohibit discrimination in compensation and discrimination against persons over the age of 40. State human relations statutes are usually at least coextensive with federal law.

A CHRONOLOGY OF AFFIRMATIVE ACTION IN THE SUPREME COURT

A flurry of recent U.S. Supreme Court decisions have focused public attention on affirmative action, a controversial topic around which swirls much emotion and misconception. A more than cursory understanding must entail a chronological review of the law.

The first case in which the Supreme Court was faced with a charge of reverse discrimination in the wake of the institution of an affirmative action plan was Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Mr. Bakke was a white male who was rejected for admission into the medical school at the University of California at Davis. He sued, alleging that he would have been admitted absent a program giving special consideration to minority students. A divided Court held that race may not be the sole criterion for a preference, unless there has been a finding that the institution has discriminated in the past. In the absence of such a finding, however, race may be considered as a factor in order to create a diverse student body.

The following year, the Court had occasion to decide another reverse discrimination affirmative action case, the first brought under Title VII. In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), a white production worker challenged a provision in the collective bargaining agreement between the Steelworkers and Kaiser Aluminum, establishing a new training program for which trainees were to be selected on the basis of race-segregated lists, one black for every white until the percentage of black craft workers reached the percentage of blacks in the local labor force. The Court found the plan valid under Title VII, holding that private, voluntary race-conscious efforts to abolish traditional patterns of racial segregation are not barred by that statute, which should not be literally construed to prohibit racial preferences in the light of its remedial purposes. Preferential treatment could not be required under Title VII, but it was not forbidden by Title VII.

The issue lay relatively dormant until 1984. The Justice Department under the Reagan Administration had become increasingly vocal in opposition to affirmative action as a means of redressing past societal discrimination. When the case of Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) came before the Supreme Court, the Justice Department saw its opportunity to persuade the Court to jettison preferential treatment in employment. The Court appeared to agree, declaring unlawful an affirmative action plan that protected the jobs of minorities and women in the Memphis Fire Department, at the expense of white males with more seniority. Its decision, however, was grounded upon the exception in Section 703(h) of Title VII for bona fide seniroity systems, and established only that a federal court may not alter a consent decree to insert a new provision overriding a seniority system found bona fide under Section 703(h), to prevent the layoff of minority employees not identified as individual victims of discrimination. The Civil Rights Division of the Justice Department, however, read the Stotts decision more broadly, vociferously insisting that Stotts leaves federal courts without power to order employment preferences under Title VII except for actual victims of discrimination.

During the 1986-87 term, the Court resolved the dispute, delineating the contours of permissible affirmative action. In Wygant v. Jackson Board of Education, ____ U.S. ____, 106 S.Ct. 1842 (1986), Justice Powell's plurality opinion struck down a plan in Jackson, Michigan schools that protected from layoffs black teachers with less senority than white teachers. The layoff plan in Stotts was ordered by the court; in Wygant, it was voluntarily negotiated in collective bargaining. Citing a lack of particularized findings of past discrimination in Jackson schools, the plurality concluded that the layoff plan at issue was not narrowly tailored in that it imposed too great a burden on innocent third parties. The Court unfavorably contrasted the layoff plan with valid hiring goals, reasoning that hiring goals are less intrusive and burdensome on innocent individuals. "Denial of a future employment opportunity is not as instrusive (sic) as loss of an exisitng job." 106 S.Ct. at 1851.

Rejecting a Reagan Administration argument that only identifiable victims of past bias may benefit from affirmative action, the Supreme Court next upheld a court order forcing a union found guilty of racial discrimination to double its non-white membership in Local 28, Sheet Metal Workers v. EEOC, ____ U.S. ____, 106 S.Ct. 3019 (1986). Where the conduct of an employer or union is egregiously discriminatory, a federal court may order affirmative race-conscious relief which benefits individuals who have not themselves been victims of discrimination. On the same day, the Court decided another affirmative action case, Local 93, Firefighters v. City of Cleveland, ____ U.S. ____, 106 S.Ct. 3063 (1986). Where a court order was the subject of the Sheet Metal Workers decision, City of Cleveland concerned a court-approved consent decree, a voluntary settlement of a lawsuit between a group of minority firefighters and the city, reserving about half of the promotions in Cleveland's Fire Department for qualified minority candidates. Because adoption of provisions in a consent decree is voluntary, the Court reasoned that such decrees do not impose unwanted obligations on employers and unions and voluntary affirmative action by consent was upheld.

On February 25, 1987, the Court handed down its decision in United States v. Paradise, 55 U.S.L.W. 4211 (Feb. 25, 1987). In a case combining factual elements of both City of Cleveland and Sheet Metal Workers, a court-ordered one for one promotion plan was validated where the Alabama Department of Public Safety had systemically excluded blacks from employment as state troopers for decades. In such circumstances, the promotion of whites may be delayed because the plan is narrowly tailored to correct proven past discrimination. One month later, the Supreme Court delivered a stunning rebuke to the Reagan Administration's opposition to affirmative action in Johnson v. Transportation Agency, Santa Clara County, 55 U.S.L.W. 4379 (March 25, 1987).

In 1978, the Santa Clara County Transportation Agency voluntarily and unilaterally adopted an affirmative action plan for hiring and promoting minorities and women. The plan provided that the Agency was authorized to consider as one factor the sex of a qualified applicant in filling positions in traditionally segregated job classifications in which women have been significantly underrepresented. The following year, the Agency announced a vacancy for the position of road dispatcher, requiring a minimum of four years of dispatch or road maintenance work experience for Santa Clara County. At that time, the Agency had never employed a woman as a road dispatcher. Among the applicants was Diana Joyce, who had worked for the county since 1970, and had been a road maintenance worker for almost five years. Another applicant was Paul Johnson, a county employee since 1967, but a road maintenance worker for only two years. Both Joyce and Johnson were deemed qualified for the position and were interviewed by a two-person board. That interview, which did not involve any objective testing, resulted in a "score" of 75 for Johnson and 73 for Joyce. Three Agency supervisors conducted a second interview, after which Johnson was recommended for the position.

Prior to the second interview, Joyce had contacted the agency's Affirmative Action Office because she had reason to believe that the panel would not be fair, after learning that one panel member had described her as a "rebel-rousing, skirt-wearing person". Id. at 4381 n.5. The Affirmative Action Coordinator recommended to the Director of the Agency that Joyce get the job. Asked at trial why he decided to adopt that recommendation, the Director testified that he took into consideration a comparison of Joyce's and Johnson's qualifications, test scores, expertise, background, and affirmative action. Joyce was placed in the road dispatcher position and Johnson sued.

Holding valid the agency's affirmative action plan, the court furnished guidelines to employers wishing to adopt voluntary plans. A plan will be deemed lawful if it passes three tests: (1) a preference is justified by the existence of a manifest imbalance that reflects underrepresentation of women in traditionally segregated job categories; (2) where a job requires special training, the comparison should be with those in the labor force who possess the relevant qualifications; and (3) the plan does not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement. An employer seeking to validate its affirmative action plan need not point to its own prior discriminatory practices, but only to a conspicuous imbalance in traditionally segregated job categories.

As Justice O'Connor's concurrence makes clear, it is not easy to reconcile the result in Wygant with the result in Johnson. Both involved public employers and voluntary plans. In Wygant, the plan was struck down; in Johnson, it was upheld. The distinction may be found in the statement of Justice Powell in Wygant that hiring goals are less burdensome on innocent third parties than layoffs.

The impact of Johnson on faculty hiring decisions largely depends on whether the vacant position is in a traditionally male (or white) job category. If a hypothetical mathematics department is staffed preponderantly with men, Johnson allows the university to adopt a policy which would favor a qualified female applicant for a faculty post in that department. The Johnson Court cited Bakke for the proposition that "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Bakke, 438 U.S. at 317. Johnson adds sex as a "plus" factor, but, as in Bakke, emphasizes that this factor alone is not to be dispositive in applicant selection.

The profusion of pronouncements on affirmative action by the Supreme Court this term should result in a better understanding by employers of the scope of permissible preferences in crafting and implementing their own affirmative action plans. If an employer is truly committed to eliminating manifest imbalances in its workforce, the Court has supplied some long-awaited guidance in doing so.

Because *Johnson* was decided so recently, none of the lower courts have yet had the *benefit of its* teachings. Consequently, the university hiring opinions reviewed were based upon earlier case law. Nonetheless, it is interesting to note how closely some of these cases prefigured the *Johnson* reasoning.

The facts in *Doran v. University of Maine*, 40 FEP Cases 276 (Me. 1986), parallel those in *Johnson in some respects.* The two applicants for Director of the University's *Center for* Human, Health and Family Studies were a male and a female, both considered well-qualified. The man was chosen by secret ballot, but the provost rejected the nomination, selecting the woman on the ground of affirmative action, because there were so few women in the Center. The man sued under the Maine Human Rights Act. The University's affirmative action plan, unlike the plan in *Johnson*, had no provision for preferences for female candidates, and the Maine *Supreme* Court held that the University could not impose *ad hoc* hiring preferences.

The existence of a comprehensive affirmative action program is evidence of a university's intent to eliminate employment discrimination and, if implemented in good faith, may predispose a court in its favor in a lawsuit based upon Title VII, as in *Coser v. Moore*, 40 FEP Cases 195 (2d Cir. 1984). In that case, a class of *current and former* female faculty at the State University of New York at Stony Brook claimed the university had engaged in a pattern and practice of sex discrimination, alleging that women were hired primarily in lower level teaching and administrative positions. The court in *Coser* found persuasive the university's defense that male faculty were hired at *higher* ranks because their prior rank and experience were legitimately considered as factors in the hiring decision. *Id.* at 199.

In *Craig v. Alabama State University*, 42 FEP Cases 471 (11th Cir. 1986), a *predominantly black state university* was sued by a white female who was not hired as Director of Federal Relations because a black female was hired instead, pursuant to the university's policy of granting hiring preferences to employees who take study leave. Although a preference for hiring current employees is facially neutral, and thus nondiscriminatory, the court noted that where the university has had a history of racial discrimination, as had the university in this case, hiring preferences for current employees perpetuate the workforce racial imbalance in violation of Title VII.

A compendium of information on the establishment of a statistical case of hiring discrimination in a university setting is found in *Chang v. University of Rhode Island*, 40 FEP Cases 3 (D.R.I. 1985). There *the court viewed the university's* employment practices with heightened scrutiny, given its blemished overall record in the adoption and implementation of an affirmative action plan. The plaintiffs produced compelling statistics demonstrating that newly hired female faculty members without doctorates were twice as likely to be assigned to the instructor rank instead of the assistant professor rank than newly hired male faculty members without doctorates. Salaries at hire were also higher for men. Salaries offered new faculty hires were compared to salaries received by their counterparts elsewhere. The court found that salaries paid to newly hired male faculty were almost invariably more than that paid to their male counterparts at other institutions, while salaries paid to newly hired female faculty were almost invariably less than that paid to their counterparts at other institutions, and that this situation was due, in part, to the university's double standard in negotiating with job applicants. The university argued that market factors accounted for the disparity in salaries at hire, but the court concluded that such factors were no defense where the university's administrators were unable to explain how market factors were used or to account for the wide variations in essentially kindred fields.

If these cases illustrate anything about hiring faculty, it is that the university must scrutinize its recruitment and hiring policies, practices and procedures for evidence of both intentional and unintentional employment discrimination against minorities and females in job placement and initial salaries. Efforts to recognize and correct incipient problems, if well documented, will reap significant rewards in a court of law. Adoption of a valid affirmative action plan is now more essential than ever, and should serve to insulate educational employers from liability for reverse discrimination if properly designed and implemented. As Justice Brennan noted in *Johnson*, "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace". *Johnson*, 55 U.S.L.W. at 4383. The university can and should be at the forefront of that worthy goal.

LIFE CYCLE—STEP ONE: RECRUITING AND HIRING THE PROFESSOR

B. AFFIRMATIVE ACTION IN FACULTY RECRUITING AND HIRING: THE TEMPLE UNIVERSITY EXPERIENCE

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TEMPLE UNIVERSITY

Affirmative action programs vary from campus to campus. Let me begin by describing Temple University in terms of our black presence. Our faculty is just under five percent black. Our student body is fifteen percent black, twenty-two percent total minority. We have more blacks students than any two or three institutions in Pennsylvania combined including historically black Cheyney and Lincoln. Until recently we had two black deans, one black full vice president, a black director of admissions and a black lobbyist. We also had four female deans and a female provost. When you look at our hiring history, women were virtually nonexistent before 1965, and blacks before 1970. We currently produce two percent of all black doctorates awarded. Nationally, we rank in the top ten. Our academic plan states that the percentage of black faculty will increase three-fold in the next ten years.

AFFIRMATIVE ACTION PROCESS AT TEMPLE

Technical compliance with affirmative action is relatively easy. You first have to have a decent job description, decent in terms of being clear and appropriate, for the positon you are advertising. Second, you must engage in wide advertising with some limited mix within the applicant pool, and assuming that you already have an institution that is about two percent black or ten to twelve percent female, you probably will end up with a white male as the final choice. And you probably will survive an EEOC review.

As stated earlier, our ten-year academic plan speaks specificially to affirmative action. Our Middle States self-study focuses on minority presence without sacrificing quality. According to the head of Middle States we are the first university to take this approach with self-study. The president and provost have publicly targeted specific departments and schools for affirmative action movement, i.e., virtually the entire School of Arts and Science, Business and Medicine.

PROCEDURAL ELEMENTS

The president and provost review each search package for technical compliance and outcome. The job description and search process flow from each other. The ads, the responses, the responses by race, sex, the pool invited, the finalists, the credentials of those finalists, and the credentials of the top minority and female candidates must be tabulated. In terms of flow, the dean reviews first, then the provost, then the affirmative action officer, and then the president. If any one of those individuals rejects the process, the search package is not going any further. It is turned back to the search committee and they have the right to appeal, add additional information, to beg, (believe me they do at times) and it comes up for round two. The same rules hold. Any one of those four people can reject on round two. If it is rejected on round two, it is dead. The search is closed. It is also important to add; no one is overruled. If the affirmative action officer rejects neither the provost nor president can overrule.

The affirmative action officer has to enjoy a healthy relationship with the deans and must be available to answer search questions early in the process. The affirmative action officer must have access to and the support of the provost, and president, and should be able to work closely with the personnel director. At Temple, I have had to reinstate individuals, order back pay and suspend managers over the objections of the personnel office. Affirmative action officers must be accessible to the faculty, students, the public, the press and to explain the policies of the office. He/she must also be able to offer training sessions on legislation that lead to affirmative action and equal educational opportunity. The affirmative action officer should not report to the personnel office. There are issues of pay equity, discipline and dismissal that are often poorly handled by a personnel office.

RECRUITMENT AND SELECTION

When we negotiate with targeted deans and chairs, the meetings are face to face. One of the things we do in that negotiating process is to look at the applicant pool in terms of the development of the job description. If you change the requirement from a doctorate required to a masters required, you would be amazed at how quickly you enlarge the pool. For blacks, at least, it is almost ridiculous to go through to a Ph.D. in accounting. The market is such that you can make the same amount of money, if not more, with a masters degree. So, if you want to be competitive in recruiting, you have to move down to the masters level. It is important, though, when you have these negotiations that everyone is involved because the search committee and the chair needs to share with you what difficulty they face. Accommodations must be worked out.

If the advertisements do not generate the type of quality that we are seeking in an affirmative candidate, then it is important to go back and work on additional steps to develop the kind of applicant pool that is necessary. I might add, and we have all used it, the old boy network is still very effective in finding affirmative candidates. It works. If you pick up the phone and call your friend at University X, they will know which women and which minorities are coming out and whether or not they are good. When I worked at Penn a long time ago, I can remember there were two black physicists graduating, and believe me there are not that many black physicists. There were at least twenty universities tracking them who knew everything these two guys did. Now Penn did not get them, that is o.k., the point is, they knew they were there and they tracked them. That is the nature of the business today.

The term "best qualified" is often used without great understanding and is a means to eliminate qualified affirmative candidates. Once an applicant clears the initial hurdle and is deemed qualified for the search committee, whether it is in the first or second cut, does it really make a lot of difference which of those four, five or six individuals you select? Usually not. It is at that point that you can begin to add factors, such as the mix within the department and how that person fits in with the rest of the academic group. Those are all viable things to add into the mix, once you deem the person qualified. The odds are after the second cut that you are only dealing with qualified individuals.

If you have a star, so be it. We all understand that no one is going to lose a star even if it is a white male, nonaffirmative hire. But if you do not have that star and simply have a group of four or five candidates who are all very similar, then you do virtually nothing. We have only had a couple of instances where academic departments have been resistant in hiring affirmative candidates. We have not had to use any, if you will, financial punishment (i.e. taking away vacancies or not giving them appointments or not giving them fellowships in subsequent years) but those options exist and they know they exist and they also know that we will use them. We still have some departments that are not doing what we think they ought to do. We have also stated that in those departments where there is not a vacancy at this time, if they are able to find an affirmative appointment we will fund that appointment for a short term. That short term may be one, two or three years, at which point the burden for that cost is taken over by the department.

As all of you know, availability of minority faculty is generally low with the exception of the areas where nobody is hiring, (i.e., education, social work). One-third to one-half of all the faculty in this country will retire by the year 2000. Given that, if we do not now begin producing black and female doctors, we will not be able to meet that need. We will be precisely where we were in the mid-seventies. Let me give you four workable illustrations of affirmative action programs designed to attract minority students to graduate education.

1. Florida

The first program is the MacKnight Foundation Program in the state of Florida. The foundation wanted to know what they could do with their money to help Florida. Somebody sold them on minority Ph.D.s. They put up $10 million; the legislature in Florida put up the additional five. The trust funds 70 black Ph.D.s in the state of Florida every year. Just to give you some sense of what they have been able to do, national output in doctorates in computer science is zero to one blacks per year; it has never been higher. In Florida, they now have five in the pipeline. Engineering — there are five black Ph.D.s produced in the country; in Florida, eleven in the pipeline. The list goes on. One of the neat things is that they are not targeting top tier kids. The black kids with high GREs are going to go to graduate school with full rides. That is not the kid they are after. They are after the second tier kid, the kid that maybe would get in, but would not get money. The only obligation is that they do their doctoral work in the state of Florida. After that, there is no obligation that they remain in Florida. Now obviously, you have captured the person for four or five years and if you cannot convince the person to stay, or cannot convince an industry to pick them up, something is wrong with you. It works very well. They are finishing the third year of operation and have only had about five kids dropped from the program.

There are other tiers to MacKnight. There is a junior faculty program for black faculty at all kinds of institutions who, at the end of three or four years, are not on track to either completing their doctorate or their research. The foundation gives them a year with full pay, and awards the institution money to replace them for that year so they can finish their research or their dissertation.

2. GEM

The second program is the Graduate Engineering for Minorities (GEM) at the University of Notre Dame. Very simply, any black engineering student with good grades, specifically 3.0 or better, who wants to pursue a masters or a doctorate applies to GEM. GEM shops those credentials around the country and gets the kid into a doctorial or masters program, full ride. It is being paid for by private industry; the institution does not pay, the kid does not pay. It is extremely successful with kids all over the country.

3. State of Pennsylvania Graduate Fair

We are doing two things in Pennsylvania. One is a copycat of one of the tiers of the MacKnight program. Every year MacKnight assembles 400 minority college juniors and seniors to come together and explore graduate and professional opportunies. They pick up the entire bill and have a graduate school fair. They have done it three times in Florida. We held our first one in Februrary in Pennsylvania for 400 kids. It worked. It is not cheap, a $40,000 effort. We had kids from all across the state assembling in Philadelphia. The kids loved it but more importantly, they got to meet kids like themselves who are academically talented black kids. Look at your own campuses. How many academically talented black kids do you have on your campus? I am not even asking how big your campus is. You do not have many. At the fair they are in an environment with 400 others like themselves. We had kids commit on the spot, kids with 3.5s and 3.8s, who were not sure what they wanted to do, "I'm going to medical school", "I'm going to law school". The graduate school fair was an overwhelming success. Where else can colleges go and find 400 potential students. It works, but you have got to sell it. That is one of our copycat efforts in Pennsylvania.

4. Pennsylvania Endowment Fund

The other MacKnight copycat effort is the Pennsylvania Endowment Fund. We are putting together a $15 million trust fund like they did in Florida. It may take us two years, but the governor has committed $2.5 million for this year and next year to cover the state's side of the share. It can be done. That is one way you begin solving that problem.

Those are the kinds of things that change where we are today. The world is changing rapidly and if we are not ready for that change we are wasting an incredibly good opportunity.

V. LIFE CYCLE—STEP TWO: PAYING THE PROFESSOR

A. MERIT, MARKET, AND COMPARABLE WORTH AT THE UNIVERSITY LEVEL

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[*]

INTRODUCTION

During the past fifteen years, I have been involved in contract negotiations at a variety of institutions: research universities, state colleges, community colleges, and small private colleges. When the compensation provisions of the contract came up, I usually deferred to those with greater expertise or interest in the topic. My role was frequently one of helping the faculty team decide on a salary proposal by mediating among their various factions. In meetings with the local's executive committee, I usually recommended establishing procedures in the contract to eliminate salary discrimination by promoting equity among faculty and staff. In most cases, this took the form of a statistical study of individual salaries and the establishment of an "equity pool" of funds to be distributed under the auspices of a union-management committee.

Salary negotiations were often centered on the issue of across-the-board vs. selective increases. In times of significant inflation and modest funding for increases, the former option was usually allocated the larger share of these funds. At research universities, some funds were always set aside for selective increases for merit or market considerations.

Although I am not now involved directly in negotiating contracts, NEA's Office of Higher Education receives a constant stream of inquiries about salary issues along with requests for speakers and consultants to visit campuses to help resolve compensation problems. Confronted by these requests, I agreed to address this topic by reflecting on my experience in light of the literature on this subject.[1] Perhaps, this paper will help those considering this topic for the first time. I have been guided herein by the 1986 NEA Statement on Professional Compensation and the Finances of Higher Education.[2] Yet, I must also point out the following comments are mine only and should not be construed to be NEA policy.

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[*] Dr. Bledsoe's paper was first presented at the Fifteenth Annual Conference of NCSCBHEP, New York, May 5, 1987, and has subsequently appeared in "Collective Bargaining Quarterly", a NEA in-house publication.

FACULTY SALARY ADMINISTRATION: ONE MODEL

In general, I subscribe to the following concepts or elements of a salary administration system for most four-year colleges and universities:

1. Salary minima by rank. The minimum salary for all faculty ranks should be specified in the contract. This constitutes the base for those elements that follow below. Obviously, salary minima should be high enough to attract qualified condidates. Salary rates should not only reflect "market" considerations but also the value society places on education and the profession's contribution to the country's commonweal.

2. Cost-of-living adjustments. All employees — faculty and staff — should not have their real income or purchasing power reduced by inflation. Keeping up with inflation must be a fundamental goal of all institutions. Deciding on an appropriate index, however, might prove difficult.

3. Maturation increases. Faculty members who make normal progress in their careers should be rewarded for their increased value to the institution. If they do not make normal or satisfactory progress, they may be denied this increase, but the burden should be on the administraton to justify this denial — in a grievance hearing, if necessary.

4. Selective increases. Under certain conditions, which are outlined below, special increases may be awarded for "merit" and "market" considerations, especially at the university level.[3]

Community, junior, and technical college faculty generally prefer schedules which set individual salaries on the basis of credentials and years of experience at the institution. There is little doubt that such a system virtually eliminates discrimination and simplifies salary administration. However, such systems are difficult, if not impossible, to apply to complex institutions like universities.

LESSONS LEARNED IN SALARY ADMINISTRATION

What follows are several lessons that I have learned from the bargaining table and the literature. No sense of priority or importance is indicated by the order in which they are listed.

1. Know your salary structure. Salary administration must be based on a complete understanding of the existing salary structure, which is the frequency of distribution of individual faculty salaries. Too many administrations and faculty bargaining agents have yet to achieve a complete understanding of their local salary structure. To make sound decisions about the distribution of future increases, it is imperative to know what impact these increases will have on this structure in the short and long terms. Given the ubiquity of microcomputers and appropriate software, it is relatively easy for this to be accomplished at institutions of all sizes.

Understanding salary structure in this way may lead to the development of salary scales or schedules which regularize the intervals between salary distribution groups. A flexible system of scales, similar to that used in the University of California system, might be useful in precluding certain equity problems and making any salary system more rational.[4] However, I do not recommend any such system or salary scale for university faculty or any that set salary maxima.

2. Analyze your salary structure for equity. Periodic studies of salaries, usually through multiple regression analysis will identify faculty members — men

and women — whose salaries are lower than others with comparable credentials and experience. Initially designed to identify women who might be the object of discrimination, such analysis will also spot males who "fall below the line". After individual cases are identified, a faculty committee should be given the task of determining whether or not these lower salaries are justified and if an equity award should be granted.

3. Redefine merit on your campus. "Merit" is a much misunderstood and misused term in academe. Almost all faculty members believe themselves to be meritorious and worthy of a special salary increase.[5] Thus, any plan that denies such increases to most faculty is viewed with skepticism, if not outright hostility. Most faculty, especially those outside of the university level, resist selective salary increases because they find it difficult to agree on what constitutes merit. They also fear that most rewards will go to the favored few.

"Merit" must be redefined as the basis for rewarding truly outstanding and superior teaching, research, and service. This means far more than "satisfactory" or even "above-average" work. We are talking about A+ work here!

To make merit pay acceptable to the faculty, it should be awarded only upon the advice of appropriate faculty bodies and upon criteria developed by the faculty or through the bargaining process. No more than 10-15% of the faculty should qualify for such awards, which should be given only to consensus candidates. Awards for merit must be relatively modest if added to base salary. Normally, they should come in the form of cash bonuses or other forms of one-time rewards. Sabbaticals, paid leaves, and other types of awards also serve to recognize and reward merit.

Most collective bargaining contracts at the university level include merit pay provisions. In some instances, these provisions have been somewhat limited because of the shortage of funds to provide across-the-board increases for all faculty, especially when the inflation rate was high and the lack of a full cost-of-living increase reduced a faculty member's real income.

It is also imperative to separate, as much as possible, the concept of "merit" from the concept of "market". Although they are related (an outstanding faculty member may become more marketable), we should try to keep the two concepts separate in our thinking and planning.

4. Use the "market factor" carefully. The "market factor" has become an important consideration in recent years as colleges and universities compete with business, industry, and the government in hiring faculty. This occurred because of two fundamental reasons: salaries in higher education suffered greatly during the 1970s and early 1980s — falling 21% or more behind those for comparable jobs elsewhere. Second, the emphasis on law, engineering, business, and technical fields, such as computer science, has made it necessary for institutions to increase their salaries in these areas significantly above the average rate in the traditional acdemic disciplines. At many universities, it has been necessary to establish separate salary scales or go "off scale" to hire faculty in high-demand areas. It is almost axiomatic — the greater the salary differential on campus, the lower the faculty's morale. For this reason alone, distortions in the salary structure should be avoided.

According to the NEA Statement on Professional Compensation and the Finances of Higher Education, institutions should exercise great caution before rushing to make numerous appointments in these areas at salary levels far above others on staff.[6] History tells us that enrollment trends are cyclical; that students will return to the liberal arts as social conditions change.

We are also aware that this emphasis on technical, occupational, and career training has provoked a widespread backlash. If our graduates cannot read, write, and compute; if they cannot communicate effectively in their language, what is accomplished by giving them a bachelor's degree and sending them into corporate America?

According to the Carnegie Foundation and other eminent organizations, our society needs individuals who can think critically, who can communicate with great efficiency and effectiveness, and who can innovate and work with others to find solutions to problems. This seems imperative when this nation's relative position in the world market is at stake.[7]

5. Keep the faculty member's career in mind. Paying professors over their career, the theme of this session, is one of the weaknesses of the bargaining process. Those who negotiate contracts tend to focus their attention myopically on the here and now. Not enough attention is given to the long-term — to the compensation of faculty members over their careers.

Experts in this area recommend that during a 25-year career, a faculty member's salary should increase 2-1/2 times. (Thirty years is more appropriate today). This requires an annual increase of 3.7% and assumes a 0 rate of inflation. Some experts have suggested annual variations in the annual percentage increase to favor junior faculty.[8]

The 2-1/2 standard or goal allows a quick check for the salary "compression" that has tormented salary structures throughout the last fifteen years or so and, according to the most recent report, continues. The rate of salary increase for senior professors fell in contrast to the lower ranks during the 1970s because of inflation when many faculty bargaining agents decided to help those at the bottom of the salary structure wih slightly larger increases. Over the years, this has been compounded, and now some of these senior professors who are on the verge of retirement are looking back and regretting this lost income which will reduce their retirement benefits significantly.

In the meantime, junior faculty, who are sometimes jealous of the tenure and higher salaries of their senior colleagues, seem oblvious to the compression problem. They forget that someday, they too will be senior faculty. If the salary structure does not permit some fair reward for experience and accomplishment, all of them may eventually suffer.

Successfully confronting the compression problem takes understanding and patience, among faculty age groups, as well as between the faculty and administration. It is not an easy problem to resolve on most campuses.

6. Comparable worth must be considered. "Comp worth"! has become a battle cry on certain campuses and its application to the study of salary structures will help eliminate invidious discrimination. Comparable worth is the concept that a faculty member in one department or discipline should be paid at the same rate as faculty in another department with similar credentials and experience irrespective of what the labor market dictates. In other words, there is an assumption that the salaries in certain departments are lower than others because of a high percentage of women in certain departments. (Sociology and library science are two that are mentioned frequently).[9]

Opponents of comparable worth usually base their arguments on the labor market which is supposedly the supreme arbiter of salary levels. Although I risk savage reprisal because of my lack of credentials as an economist, I cannot believe that the labor market, this venerable institution, is any freer of discrimination than any other institution in our society, including our colleges and universities.

Ways have been developed to determine whether or not there exists any acceptable basis for paying occupational groups where women predominate less than those dominated by men. Many of these methods can and should be applied to academics in higher education. Success has been achieved in several notable cases, especially among academic staff in Florida and Maine, but there are few examples among the traditional academic disciplines.[10]

Discrimination against women has been, and continues to be, persistent — even in our ivied halls of enlightenment. As long as middle-aged, white males dominate these institutions — and that appears to be likely over the intermediate term — discrimination will continue.

The usual criteria for promotion in rank and salary leads to discrimination against women. Of the "big three" areas of academic activity — teaching, research, and service — the two where women must devote most of their time and seem to excel — teaching and service — have been accorded a much lower priority in this "publish or perish" atmosphere.

Yet some institutions, especially those with collective bargaining, have made great strides in this area, or so it is my impression. In the words of one expert, "Nondiscriminatory behavior (on campus) requires that people be treated as they would in a nondiscriminatory market".[11] If we allow the external market to determine salaries in academe, these salaries will remain discriminatory for a long time to come.

7. Apply problem-solving techniques to salary negotiations. My final recommendation is to use problem-solving methods to avoid major confrontations over salary increases. By careful analysis and understanding of the salary structure, by assiduous work to eliminate inequities and discrimination — both for men and women, by avoiding the reduction of negotiations to a single numerical percentage — 5, 6, 7 or 18% — the parties might reduce the tension and conflict that too frequently accompanies negotiations. This requires a good, shared data base, the sharing of other information, and a commitment to using to best advantage all funds available for salary increases. If salary negotiations become a test of will or strength, it is unlikely that the purposes of the institution will be served in the long term.

Although most faculty members were not attracted into academe by salary, and few stay because of financial rewards, surveys of faculty opinion reflect a strong concern over salary policy. Major income loss to inflation during the 1970s, constant predictions of overall enrollment declines (that did not materialize at most institutions), shifts in student interests, and news of faculty retrenchments have all contributed to low morale, a doom and gloom mentality on some campuses and an abiding insecurity in too many corners of most campuses. Many faculty members reacted to their financial problem by supplementing their salaries by consulting or moonlighting while others enjoyed a spouse's income.

CONCLUSION

Salary administration is a critical aspect of campus life. It should neither be treated lightly nor at the last moment in negotiations. At the university level in particular, salary administration and compensation policies deserve careful consideration, regular analysis, and concern both for the short and long terms. The career earnings and retirement plans of the faculty should also be evaluated regularly. Also, the faculty and administrations should well understand the ramifications of all decisions made in this area. Only in this way can mistakes be avoided that might negatively affect compensation or the local salary structure for a decade or longer.

To recruit the better graduate student into the profession, to compete successfully with business and industry, starting salaries must be increased. To improve morale and quality, the current attempt to improve the salaries of continuing faculty must be continued. To sustain or to improve this country's ability to compete in world markets and continue to make contributions to solving social problems, major investments in higher education must be made. Those of us at the bargaining table should be willing to look beyond traditional gamesmanship and posturing to find better ways to utilize available resources. Our responsibility is greater than a few percentage points or contract language, it is the future of our institutions and society.

FOOTNOTES

[1] My remarks will echo many of those made in this place by J. N. Musto, "Merit Determination as a Factory of Faculty Salary", Proceedings, 12th Annual Conference, National Center for the Study of Collective Bargaining in Higher Education and the Professions (New York, NY: Baruch College, CUNY, 1984). I must also acknowledge the help given me by my former colleague, Ms. Maryse Eymonerie, president of her own company, in McLean, Virginia, who collects and analyzes compensation data for AAUP and other clients.

[2] "Statement on Professional Compensation and the Finances of Higher Education", The NEA Higher Education Advocate, January 30, 1987. Copies of this publication are available from the NEA Office of Higher Education, Suite 321, 1201 16th Street NW, Washington, DC 20036.

[3] This system of salary administration was outlined originally by Peter Steiner of the University of Michigan in "Coping with Adversity: Report on the Economic Status of the Profession, 1971-72", The Bulletin of the American Association of University Professors, Summer, 1972, 190-1.

[4] Alfred Manaster, "The California 'Step System'", Academe: Bulletin of the AAUP, July-August, 1985, 23-6.

[5] See J. N. Musto's article, cited above, note #1.

[6] "Statement on Professional Compensation and the Finances of Higher Education", cited above, note #2.

[7] Ernest L. Boyer, College: The Undergraduate Experience in America (New York: Harper and Row, 1987).

[8] AAUP Bulletin, Summer, 1972, cited above, note #3.

[9] Barbara Bergman, "Comparable Worth on Campus", Academe: The Bulletin of the AAUP, July-August, 1985.

[10] The Chronicle of Higher Education.

[11] Bergman, cited above, note #9.

LIFE CYCLE—STEP TWO: PAYING THE PROFESSOR

B. DISCRIMINATION IN COMPENSATION: CURRENT STATUS OF THE CASE LAW

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The determination of the United States District Court in *Melani v. Board of Higher Education City of New York*, 561 F. Supp. 789, 31 FEP 639 (1977) has been extensively commented on in the 1986 Proceedings of the 14th Annual Conference of the National Center. That decision sought to adjust salary inequities based upon the sex of members of plaintiff's class to which *Melani* belonged. *Melani* was able to prove there existed a discriminatory pattern and practice beyond what might be characterized as an isolated, accidental, sporadic act. By doing so, the class met the standard of *Teamsters v. United States*, 431 U.S. 336, (1977). Impact cases on the other hand need not be supported by proof of discriminatory intent.

Melani argued that City University of New York (CUNY) paid female instructors less than males "as general practice". CUNY's defense, that any analysis of the faculty would have to take into account multiple variables used in the hiring process including publications, years of experience, quality of teaching, committee work, community service and the demands of particular fields, still left CUNY with a profile of discrimination. The consent decree created a fund for the adjustment of salary designed to alleviate the alleged discrimination.

The decision in *Melani* was not inconsistent with determinations made in cases arising up to that time. In *Citron v. Jackson State*, 456 F. Supp. 3, 21 FEP 1188 (1977), the Southern District of Mississippi had ruled that a white professor had not been discriminated against in salary. The white professor had alleged that his raises had not kept up with black colleagues. However, the proof revealed that he had delayed submission of transcripts and his doctoral program progress justified his retention on a masters scale with other individuals with masters degrees. The decision in *Citron* indicates the standard that clear evidence of a nondiscriminatory rationale for salary treatment will vindicate salary placement claims based upon an allegation of otherwise discriminatory conduct.

In a similar matter, *Sobol v. Yeshiva University*, 477 F. Supp. 1161, 21 FEP 49 (1979), the Southern District of New York held that a finding of wage disparity must be made upon a determination of the intent and effect of faculty appointments. The court would take into account variables such as the employee's experience and skill and the reason for hiring the employee. An analysis of wages correlated to variables would yield a guideline. Evidence of out-of-line increases could prove the existence of favoritism to one sex or the other.

In Kim v. Coppin State College, 662 F.2d, 27 FEP 1 (1981), the value of statistics was even more forcefully underlined and, in that matter, the Fourth Circuit held that the mere denial of increases, other than cost-of-living, could have been based upon the lack of plaintiff's cooperation in the college's efforts to secure a National Science Foundation grant and upon the uncooperative dealings by two faculty members with college administrations and their reported participation in a student boycott of the school.

The decision of the First Circuit in Lamphere v. Brown University, 685 F.2d 743, 29 FEP 701 (1982), held that the fact that a female faculty member serves in a department that is paid less than other departments is a defense to an argument that female faculty members are paid less than their male counterparts. This case was, however, contaminated by a record that indicated that plaintiff Lamphere had failed to publish:

> Appellant acknowledges, however, that she received raises at approximately the departmental average throughout this period. Moreover, it is uncontested that those faculty members who published — both male and female — received higher raises than those who did not. Finally, the provost testified that "catch up" was just a "general policy" and that it was only used when the faculty member "was performing properly". Given the District Court's supportable findings that appellant had failed to publish anything since coming to Brown and that her "continued scholarship in this period did not remotely approach the achievements of those with whom she would be compared", we conclude that the court committed no error in finding that appellant's failure to receive higher raises during this time was not the result of sex discrimination.

In a 1985 action testing further the terms of the consent decree in Lamphere v. Brown, 613 F. Supp. 971, 38 FEP 871 (1985), the District Court considered the question of whether or not the single appointment was denied to a female applicant on the grounds of sex-based discrimination. The case stands for, if anything, the difficulty of academic committees reviewing the intricacies of consent decrees. After some discussion of the shifting nature of the appointment sought by the female faculty member, the court ruled that even under a consent decree all questions involving whether or not individual discrimination has occurred would require de novo review by the courts. In this case, the plaintiff had difficult relationships in her own department and the court noted "the plaintiff was barred from the position not because she was a woman but because she could not secure an appointment in the economics department". That failure was based not upon considerations of sex but her own relationship with the department members. In a similar matter, Gottlieb v. Tulane, 809 F.2d 278, 37 FEP 116 (1985), again considered the question of an appointment lost because of noncollegial behavior. Gottlieb, a medical school faculty member who was transferred from a tenured position in another institution into a series of one year special appointments and was subsequently denied permanent appointment was found not to have been subject to discrimination based on sex. The evidence indicated both noncollegial behavior and a limited record of publications were present and would not sustain an appointment.

There is no longer any dispute concerning the right of employers to advance discriminated classes at faster rates to remedy past discrimination. In an interesting collateral attack on the concept, however, a group of male professors at Temple University argued that it was improper for the university to adopt an affirmative action plan raising female professors' salaries above those of male professors despite the fact that disparate raises were given to compensate for perceived past discrimination.

> In contrast an employer seeking to rectify existing wage inequality need not permanently pay less wages for equal work to one sex than to the other. The employer may employ an affirmative action plan that provides a one time compensatory payment, confers salary increases to female employees only, or raises the salary of female employees more than male employees, and still not have resulting salary levels that permanently differentiate on account of sex.

Plaintiffs in Lyon v. Temple University, 543 F. Supp. 1372, 30 FEP 1030 (1982), argued that the raises given by the university in this situation placed them "at an unnecessary and permanent salary disadvantage compared with female employees having like or lesser skills or responsibilities". The court noted:

> We have found no post-Weber case that considered whether an affirmative action plan resulting in higher pay for women than for men, because of the employee's sex, violates the EPA.

The question of the propriety of affirmative action plans designed to set numerical hiring and promotional goals to rectify perceived sex-based discrimination has been laid to rest in Johnson v. Transportation Agency, Santa Clara County, Cal., ____ U.S. ____ (Case No. 85-1129). In that case, the Supreme Court squarely ruled that sex was an appropriate factor for review in promotional decisions made by employers to adopt voluntary flexible plans designed to remedy manifest inbalances in employment patterns. Of course, the Supreme Court's determination leaves open many questions on any such plan and the proof on which it is based. It does, however, lay to rest the constitutionality of affirmative action to remedy sex-based discrimination.

An alleged individual discrimination case becomes far more difficult to establish. In Winkes v. Brown, 747 F.2d 792, 36 FEP 120 (1984), the First Circuit was confronted with the issue of disparity of pay caused by Brown University's decision to match the salary offered by another university to a tenured faculty member where it raised the salary of the female faculty member beyond that of a similarly placed male. The Winkes case was contaminated by the fact that it followed within six months a consent decree settling sex discrimination actions commenced by another Brown faculty member. Here, although the timing was poor, the First Circuit was willing to rule that the university acted within its right.

> A university, is, of course, not free of the Equal Pay Act but when it is confronted with possibly opposing pressures or obligations, some of which involve the difficult subject of gender, it must be allowed substantial room to manuever rather than find itself between the devil and the deep blue sea. Otherwise, instead of some measure of academic freedom, it will face the constant prospect of judicial reproof.

LIFE CYCLE—STEP TWO: PAYING THE PROFESSOR

C. CANADIAN FACULTY COMPENSATION EXPERIENCE

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THE CANADIAN MODEL

Comparing salary and compensation structure and data between two countries is a difficult task at best. However, an understanding of the complexities of one system might assist those in others to further develop broader understanding of similar problems. Basically, each local faculty association in Canadian universities runs its own affairs and settles terms and conditions of employment of faculty members with the employer (usually a board of governors) by labour negotiation, or through special legislation (in the province of Alberta), through "special plan" bargaining, or in the "old-fashioned way" by "binding supplication"! The Canadian Association of University Teachers (CAUT) provides guidance and assistance to locals (outside Quebec) when asked to do so, but there is no national union which negotiates terms nationally for all faculty members.

Although Statistics Canada lists over 100 universities and colleges in Canada, many of them are small institutions that are affiliated with larger universities and a number are so specialized that they should not be considered as universities. Of the remaining 50 universities and colleges in Canada, eight are in the province (state) of Quebec and salary data for those institutions are released much later than from other places; so such data are not included in this paper.

The data analysed here are from 37 Canadian universities. Full-time annual (12 month) salary rates for full-time faculty members with the rank of assistant professor or above, and who hold a doctoral degree, are included. Excluded are salary rates for persons who hold senior administrative positions (e.g. deans) and salary rates for those who are qualified in medicine or in dentistry. Salary rates subject to these limitations are more stable and less variable than unrestricted data.

EXPECTED LIFETIME ANNUAL EARNINGS

Since academic salary rates are highly correlated with age (correlation 0.83 in the data analysed here), some method is required to remove the effect of different age distributions from year to year or from university to university.

The procedure used here is to compute the regression of salary rate on age then, using that regression line, sum the salary rates one would expect at age 27, 28, 29,..., 63, 64. If this sum is divided by 44, it yields an average over the adult years 21 to 64 which I term "Expected Lifetime Annual Earnings" (ELAE). Such results might be compared with data from other occupations which begin full earnings at age 21.

ELAE AND INFLATION

The ELAE for the academic year 1979-80 was $29,711 and for 1985-86, it had increased to $44,234. Assuming that salary increases are likely to lag behind inflation by about six months, the relevant change in the All-items Consumer Price Index (CPI) is from 77.1 to 124.6; so ELAE in 1985-86 should have been $48,015. Salary rates have therefore fallen behind inflation by 7.9%. By comparison, the Industrial Aggregate Weekly Earnings in Canada increased from $268.09 a week in July 1979 to $420.00 in July 1985, which is below the CPI-predicted figure of $433.26 by 3.1% (it should be noted that $268.09 is a figure that has been adjusted to take account of a new basis adopted in April 1983). Academic salaries have fallen behind inflation over the last six or seven years, and more so than wages and salaries generally. But the loss is not very large.

UNIONS AND NONUNIONS

About half of all full-time faculty members and professional librarians in Canadian universities are members of bargaining units set up under provincial labour legislation. Outside Quebec, the unionized figure is about 40%. The ELAE for about 4000 faculty members (now unionized) in 1979-80 was $28,689 and in 1985-86, it was $43,692. The latter is 5.8% below the increase required (i.e. $46,364) to keep up with inflation. The ELAE for about 7000 nonunionized faculty in 1979-80 was $30,283 and in 1985-86, it was $44,579. This latter is 8.9% lower than the $48,940 that inflation would require. It seems that unionized faculty members had poorer salaries than the nonunionized in 1979-80, but that they have been catching up. In fact, about 25% of the unionized faculty analysed above became unionized either at the beginning of or during the period 1979-80 to 1985-86. Poor pay was very probably an important factor that motivated professors to unionize, as it has motivated people in many other occupations.

LOCAL VARIATION

This is different from what happens in the United Kingdom where the Association of University Teachers (AUT) is a trade union that negotiates national salary scales for all faculty members in Scotland, England, Wales and Northern Ireland. The existence of "state rights" in Canada would not prevent national bargaining and national standards if we had a will to achieve that. Australia is a federation of states and education is clearly a state right there. But the Federal Association of University Staff Associations (FAUSA) settles faculty salary scales for all six states, as well as the two federally-controlled territories. Of course, that is done through the Commonwealth Conciliation and Arbitration Commission set up under the Australian constitution. But the national basis for university salaries is only about ten years old. It arises from the fact that the Commonwealth (federal) government in Australia provides most of the money (from taxation) to run the universities. The main source of funds in Canada is also the federal government.

Local variation can be seen in the ELAE for 20 of the larger universities in Canada for 1979-80 and 1985-86.

TABLE 1

Expected Lifetime Annual Earnings Calculated in 1979-80 and 1985-86 for Twenty Large Universities

	ELAE		RANK	
University	1979-80	1985-86	1979-80	1985-86
Alberta	$32,206	$48,129	1	1
Simon Fraser	32,140	43,191	2	13
Waterloo	31,260	46,609	3	5
Calgary	31,122	47,107	4	3
UBC	31,020	41,166	5	17
Ottawa	30,698	44,663	6	9
Saskatchewan	30,558	46,868	7	4
McMaster	30,419	46,427	8	6
Toronto	29,846	48,006	9	2
Windsor	29,553	41,882	10	16
Victoria	29,425	40,625	11	18
Guelph	29,346	42,978	12	14
Manitoba	29,206	45,657	13	7
York	29,073	43,642	14	12
Western Ontario	29,033	45,049	15	8
Carleton	28,838	44,098	16	11
Dalhousie	27,887	42,165	17	15
Regina	27,724	40,101	18	19
Memorial	26,445	37,170	19	20
UNB	24,106	44,220	20	10

Some of the shifts in ELAE seen in Table 1 are attributable to provincial government action. For example, the drop for Simon Fraser, UBC and Victoria arose from action by the government of British Columbia. Some shifts come from good terms negotiated under labour legislation — that is true of the University of New Brunswick's jump from 20th to 10th by tying salary increases to changes in the Consumer Price Index. And some arise from a good settlement by arbitration. Such is the case for the University of Toronto which uses "special plan" procedures.

FLEXIBILITY OR SOLIDARITY

It is interesting to note that the correlation between salary rates and age for 4533 unionized faculty members in 1985-86 was 0.853 while it was 0.806 for the 7569 nonunionized that year. This suggests less variation in salary rates, independent of age, in unionized than in nonunionized places. The situation at Dalhousie University (which is unionized) may illustrate the fact that a wide range of salaries above scale weakens a union by reducing solidarity. Persons paid $10,000 or $15,000 above scale value may be less willing to engage in strong job actions such as strikes in order to achieve an extra percent or two of salary for everyone. Dalhousie had a one-day strike in January 1985 but the membership split almost 50/50 on whether to have a further prolonged walk-out. Survey evidence indicated that the people who changed their earlier vote from striking to non-striking were the more senior faculty (full professors), and those earning over $50,000 per year in whatever rank. Many unions have pushed hard to have salaries on scale (as they are in the United Kingdom and in Australia) and such a strategy may well be necessary to prevent management's thrust for flexibility from seriously undermining faculty members' bargaining strength.

AGE, CAREER POINT, ANOMALIES, MERIT AND MARKET

Age is not a measure of one's value to a university though it will be correlated with such value. At Dalhousie University, we negotiated a Career-Point system into our first collective agreement that says that one's credit year is Y=s + e + Ph.D. where "s" is the number of years of creditable service in the rank of lecturer or equivalent or above in universities or equivalent institutions, "e" is the sum of years of other relevant experience weighted by the extent of their relevance, and "Ph.D." is 3 for the possession of the Ph.D. degree or its equivalent. A limit of 5 is placed on "e". This system was used in 1980 to correct anomalies in salaries and was judged to be very successful. Basically, people below scale had their salaries brought up to scale over a three-year period — this cost about $750,000 in a $20 million salary budget. But there remained quite a large spread above scale and new people continue to be hired either on scale (if they do not, cannot or will not push for more) or above scale in varying degrees. One can argue for above-scale salaries on the grounds of meritorious performance or special market factors. Equally, one can argue that this "flexible" system simply reintroduces anomalies. As was suggested above, such variation is likely to undermine whatever bargaining strength faculty members might have. If room has to be made for merit pay and market premiums, it might be best to do so in a 3, 5 or 7 layer grid above scale. Placement would have to be in that grid, and above-scale positions would be gradually moved down towards scale, unless proper procedures endorsed above-scale pay by reason of meritorious performance, or because a job offer was received from elsewhere and it was judged desirable to keep the faculty member if that could be done for a few thousand dollars a year. But other places survive well without such merit, market and red-circling complications.

VI. LIFE CYCLE—STEP THREE: TENURING THE PROFESSOR

A. A LEGAL ANALYSIS OF TENURE ISSUE— AN AAUP PERSPECTIVE

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INTRODUCTION

Tenure is a hardy institution. Always under attack, it survives and, I will say recklessly, even flourishes. In the last decade, for example, we have observed a lively discussion of alternatives to tenure. Yet, every serious study of tenure I am aware of has concluded that, on balance, the old ways are best. More to the point, administrators and legislators have generally hesitated to dismantle traditional tenure, although they have eroded it by excessive nontenure track and part-time appointments. I will give this topic a strong legal flavor, with emphasis on AAUP documents because they are what I live with. I do not mean to denigrate the devotion to tenure of the other organizations that seek to represent faculties, namely AFT and NEA. Indeed, NEA, with its vast resources, probably contests more tenure cases than AAUP could conceivably take on.

THE 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE

Most faculty organizations stand firmly by the famous 1940 Statement of Principles on Academic Freedom and Tenure. That Statement was the third such to be promulgated by AAUP. The first, in 1915, coincided with the founding of AAUP. I think it is fair to say that the 1915 Statement marks the beginning of the systematic linkage of tenure with academic freedom. Even so, that Statement's recommendations about tenure come only at the very end of a substantial essay (20-pages plus) on academic freedom and responsibility. Those "practical recommendations", as they were called, do include an unequivocal assertion that tenure should be permanent "after ten years of service", and that removal can be accomplished only after specific charges are adjudicated by a committee chosen by the faculty.[1]

In the generations preceding the 1915 Statement, it is doubtful if tenure had any legal foundation. The ground for differences between administrators and trustees on one side, and faculty members on the other could be Unitarianism, Darwinism, free silver, protective tariff, or child labor; but if the differences became tense enough, the professors were dismissed. Nobody ever dismissed the predominantly conservative trustees. One of the episodes that energized the formation of AAUP was the firing of Scott Nearing from the University of

Pennsylvania for his radical economic views. Two years later Nearing was fired from the University of Toledo for criticizing our entry into World War I. That was the end of his formal teaching career although he lived on for almost 60 years, and became the teacher of our flower children. Other prominent academics lost their jobs in 1917, notably at Columbia. I don't think anyone thought that they had suffered a legal wrong. The few reported cases agreed.[2]

The second AAUP Statement in 1925 represented a remarkable detente with the Association of American Colleges (AAC). That organization, also founded in 1915, quickly issued a statement ridiculing the claims of AAUP's founders. But its presidential leadership did an about-face in 1922. The 1925 statement was a very different production; it was somewhat more cautious than AAUP's own of 1915, but it did endorse tenure.[3]

The 1940 Statement, also a joint production with the AAC, settled the maximum probationary period at seven years; and it asserts firmly that:

> After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

It explains that:

> Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

A. Academic Freedom

The protection of academic freedom remains the primary *raison d'etre* of tenure. Some years ago, it became fashionable to assert that now the courts would protect academic freedom so that tenure was superfluous. It is theoretically true that in public institutions, as in public employment generally, you cannot be dismissed for exerting your First Amendment freedom of speech in ways that are distasteful to your employer, provided that what you say is not recklessly false or disruptive, and provided further that you can show that the employer didn't have other sufficient grounds for getting rid of you, and provided further that the speech was on a "matter of public concern". You also have to be able to support a lawsuit, and you probably won't be able to get any money damages against a public institution. This is a distillation of three Supreme Court decisions — *Pickering*, *Mt. Healthy*, and *Connick*[4] — and their progeny. It all provides mighty cold comfort.

The hard-to-get relief offered by *Pickering* and company is a reminder that we need academic freedom protection more against insiders than outsiders. Kingman Brewster put this crisply as part of the best short defense of tenure that I know:

> The dramatic image of the university under siege from taxpayers, politicians, or even occasional alumni is a vivid but not the most difficult aspect of the

> pressures which tend to erode academic freedom. The more subtle condition of academic freedom is that faculty members, once they have proved their potential during a period of junior probation, should not feel beholden to anyone, especially Department Chairmen, Deans, Provosts, or Presidents, for favor, let alone for survival. In David Reisman's phrase teachers and scholars should, insofar as possible, be truly 'inner directed' — guided by their own intellectual curiosity, insight, and conscience. In the development of their ideas they should not be looking over their shoulders either in hope of favor or in fear of disfavor from anyone other than the judgment of an informed and critical posterity.
>
> In strong universities, assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection from external interference.[5]

B. Economic Security

The second prop of tenure is the economic security argument. There was a time, it must have been twenty years ago, when it was fashionable to denigrate this reason. Believe it or not, academic salaries were so good that it was a little embarrassing to say that we needed tenure as a substitute for money. But, after the 15% loss in real income to faculty that occurred after 1970, one doesn't hear this counter-argument any more. Nor are we likely to. Legislators don't like to raise faculty salaries; and as comparable professions continue to outdistance our compensation, there is little likelihood that we will close the gap.

The "security" rationale has its own strength divorced from economics. A professor should be able to take long views of his or her career. Insecurity doesn't keep us on our toes, but on our knees.

C. Collegiality

A third and rather original argument for tenure is advanced by Bowen and Schuster in their wise book, American Professors: A National Resource Imperilled (1986). "Tenure", they say,

> is conducive to collegiality. A college or university to be maximally effective must be a community to which people belong and which they care about... Such collegiality is not created instantly or spontaneously. It is developed over time through the presence of committed faculties. Tenure is a powerful tool for enlisting that commitment. (pp. 236-7).

So, we need tenure both to protect us from our colleagues, as Brewster warned, and to help us be good colleagues. There is no paradox; both propositions co-exist.

DUE PROCESS REQUIREMENTS

I now want to turn to the procedures that are appropriate in reaching the tenure decision. I will borrow from part of a report on "Due Process in Decisions Relating to Tenure in Higher Education", by The Committee on Education and the Law of the August Association of the Bar of the City of New York.[6] I do so because, having written the report (with valuable guidance from my colleagues), I think that it is a sound statement. I also want to refer you particularly to an AAUP "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments".[7]

A candidate for tenure at most institutions proceeds through a series of annual appointments, at any of which nonrenewal may occur. If the probationary period is seven years, standard practice requires a decision by the end of the sixth year, in order to afford a year's notice to a rejected candidate. Preferable practice in universities provides for term probationary appointments of two or three years each. These provide greater stability than annual appointments for the candidate to develop substantial research and teaching programs. Whatever the interval between decisions, it is unlikely that a federal constitutional right to formal procedures in the reappointment process can be made out, unless such a right has a foundation in state law.

This is a consequence of *Board of Regents v. Roth* (1972)[8] which developed the doctrine that, before one can invoke the protection of 14th Amendment due process for a deprivation of property in public employment, the property interest to be protected must be found primarily in state law. Roth had an initial one-year appointment in the University of Wisconsin — Oshkosh. The Court found nothing in Wisconsin law to give him any assurance of continuance, and accordingly held that he had no entitlement to the renewal of his appointment that would invoke, by way of § 1983, the protection of the due process clause. However, in a companion case, *Perry v. Sindermann*,[9] the Court said that a faculty member who was dismissed after ten years' service at a college that had no regular tenure system should have an opportunity to show that he had tenure *de facto*.

Building on both *Roth* and *Sindermann*, one can argue that although a new one-year appointee can be summarily let go at the end of that year, a tenure candidate who has served for the whole probationary period does have an entitlement to a non-arbitrary procedure. But that entitlement would still have to find its roots in state law, so it seems more realistic to work through state sources of law — legislative, judicial, or administrative — for the recognition of a right to participate in at least one thorough ventilation of any claims the candidate may have of arbitrary or inadequate consideration of his or her record and potential.

If the candidate asserts that infringement of academic freedom occurred in the selection process, this is a federal right for a public employee, provided that the nexus between the academic freedom claim and the First Amendment can be established. This is the consequence of *Pickering v. Board of Education*, already mentioned. But, because of the narrow boundaries of *Pickering*, even in the heartland of academic freedom, a rejected probationer will have hard going in the federal courts. In the private sector, faculty members who claim that their dismissals are violative of academic freedom may be assisted by the increasing recognition that policies reflected in the First Amendment are central to the concept of "wrongful discharge". But the Third Circuit recently declined to apply this concept in *Sola v. Lafayette College*, 804 F.2d 40 (3d Cir. 1986). Good state laws and institutional regulations are needed.

In addition to the classic 1940 Statement, over the years the AAUP has developed model regulations that are also influential. But they recognize that a probationer who charges that a decision not to reappoint "was based significantly on considerations violative of academic freedom" bears the burden of proof.[10]

It must be emphasized that everything that we have said so far about the availability of federal constitutional protection through the 14th Amendment requires a finding of "state action", and generally affords no protection to faculty in private colleges and universities. These, though they are a declining portion, still amount to over one-fourth of all faculty.[11] However, state constitutional guarantees can and do reach private institutions.

STANDARDS AND GOALS FOR CONFERRING OF TENURE

There are sharp constitutional imperatives, which are often reluctantly invoked, by no means measure the limits of good practice. Good practice, embodied in regulations, may establish enforceable contractual rights.[12] It is, accordingly, in the interest both of administrations and faculty representatives, to think through what is desirable for the health of the institution and of the teaching profession before regulations are promulgated.

The goals to be sought are clarity, consistency, and fairness. Clarity is approached, if not attained, by stating, in advance, both in general regulations and in writing to each probationer, what the procedures and standards are. Total clarity is unachievable because it is so difficult to define expectations of performance without resorting to banalities and hyperbole. But, if the leaders of an institution think realistically about its mission, they can say something helpful about the mix and quality of teaching skill, research productivity and service to the community (inside and outside) that the probationer must attain. In a community college, teaching will be paramount. In an elite research university, original research will be highly prized. In a comprehensive public university, service to many constituencies will be expected.

Even if it is difficult to define specific standards for retention or tenure that embrace the entire institution, I believe that the search for clarity can be carried farther at the divisional or departmental level than is often done. It is a plausible supposition that many academic decision-makers prefer ambiguity, and have not tried hard enough to define expectations within a discipline for their probationers in that discipline. They should try harder. Then, criteria for retention and advancement (especially if they are made more stringent) should be insistently communicated, preferably by periodic review and evaluation which will tell the probationer straightforwardly how performance is matching expectations.

Consistency will be aided by an internal review process that oversees the recomendations of the appointing department. Both error and slackness can be minimized if the initial recommendation to retain or not to retain is reviewed by an experienced faculty committee, and by appropriate senior academic officers. These reviews should not replicate judgments of professional worth, but they may properly require the primary peer group to establish the rationality of its verdict.

Fairness, to the legal mind, reflexively implies a trial-type proceeding. But most retention decisions are not controversial, and even when they are, a full-dress confrontation is not the only way to a fair outcome. Even after all possible clarity is distilled, the judgment to be made looks ahead as best it can from evaluated achievement to a prediction of lasting performance. That judgment also includes the prospect of a long-lasting association. To some extent, collegial capacities are also relevant to the tenure decision; this is an element of judgment that can be inflated and abused. The question should not ask whether the candidate is a good companion, but only whether he or she can perform with adequate civility. These are all concerns that are not well resolved in a setting of record evidence, confrontation, and findings of fact.

A middle ground between full process and no process has two prominent features. First, the probationer who is not reappointed or granted tenure is entitled, upon request, to a written statement of reasons for the decision. Second, he or she should be afforded "some kind of a hearing". I am quite aware that assigned reasons can be perfunctory and even duplicitous. The hearing, which is a type of grievance procedure, can respond, among other issues, to a grievant's complaint that the reasons given are defective. The grievance committee, whose members should be colleagues who were not involved in the decision complained of, can also determine whether a *prima facie* case of discrimination or of academic freedom infringement has been made out. Finally, it can respond to a claim of "inadequate consideration". This is an AAUP formulation, from the Statement on Procedural Standards that I've already mentioned, that permits the grievance committee to shake up a department that has not done its homework; but that committee "should not substitute its judgment on the merits for that of the faculty body" with primary expertise and responsibility. The grievance committee can remand, but it should not decide. It should, in any event, route its report to an officer who can see to it that the department does not bury or mismanage the matter.

Exceptionally, when the local faculty is compromised or deadlocked, it may be appropriate for a dean or president to create an ad hoc committee of outside scholars, and to act on the recommendation of that committee.

JUDICIAL INTERVENTION IN TENURE DECISIONS

If a discrimination claim is the reason for going to court, then the court must and will hear the case. The handling of discrimination cases is a topic in itself, and a sobering one for complainants, according to the account in the *Chronicle* of the new book by Professors LaNoue and Lee. Where the jilted professor claims defects in the process, the courts will listen, but they are respectful of academic procedures if they are basically reasonable. Illustrative examples of this approach are found in *Beitzell v. Jeffrey*, 643 F. 2d 870 (1st Cir. 1981), and *Mayberry v. Dees*, 663 F. 2d 502 (4th Cir. 1981), also *Sola v. Lafayette* mentioned earlier.

If the objection is that the non-reappointment was simply wrong, forget it. In a very recent case, a former assistant professor at the University of Illinois who hadn't published anything was told that his federal appeal was frivolous and that he would have to pay the University's legal fees for the appeal.[13] That's an extreme case, but surely a cautionary one.

NONTENURE TRACK APPOINTMENTS

A final word about the prevalence of off-track full-time appointments, and the excessive number of part-time appointments. Some use of part-time faculty is entirely defensible to cope with special needs and with unpredictable swings in enrollment. But it is pernicious to force into part-time teaching people who don't want to be there, or to make nomads of scholars by offering them only "folding chairs". It's not just that such practices make a mockery of tenure by denying it wholesale, it's that these exclusions undercut central values of the whole noble calling of higher education. The values of collegiality and cooperation are simply inaccessible to those whom we treat as marginal or temporary. Something must be done.

FOOTNOTES

[1] The 1915 Statement was reprinted in *AAUP Bulletin* 40:89 (1954), and is App. A of AAUP, *Academic Freedom and Tenure Handbook*, ed. Joughin, 1967, p. 155.

[2] See Metzger, "Academic Tenure in America: A Historical Essay", in Commission on Academic Freedom, *Faculty Tenure*, 1973, pp. 129-34.

[3] See Hofstadter and Metzger, *Development of Academic Freedom in the United States*, 1955, pp. 483-86.

[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Connick v. Meyers*, 461 U.S. 138 (1983).

[5] Brewster, "On Tenure", 58 *AAUP Bull.* 381 (1972).

[6] In 39 *The Record* of the Association 392 (1984), and reprinted in 11 Journal of College & University Law 323 (1984).

[7] In AAUP, Policy Documents and Reports (1984) 14.

[8] 408 U.S. 564 (1972).

[9] 408 U.S. 593 (1972). Commentary on *Roth* and *Sindermann* has been extensive. See, e.g., P. Simon, "Liberty and Property in the Supreme Court: A Defense of Roth and Perry". 71 *Calif. Law Review* 146 (1983); L. Tribe, *American Constitutional Law* 501 (1978): W. Van Alstyne, "Cracks in 'The New Property': Adjudicative Due Process in the Administrative State", 62 *Cornell Law Review*" 445 (1977).

[10] "1982 Recommended Institutional Regulations on Academic Freedom and Tenure", *Academe* 69 (No. 1) 15a (1983).

[11] See *State v. Schmid*, 84 N.J. 535 423 A. 2d 615 (1980), appeal dismissed *sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (private university violated state constitutional rights of defendant by evicting him and securing his arrest for distributing political literature on campus).

[12] See M. Finkin, "Regulation by Agreement: The Case of Private Higher Education", 65 *Iowa Law Review* 1119 (1980): M. Malin and R. Ladenson, "University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection", 16 *U.C.D. Law Review* 933 (1983).

[13] *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Circuit, 1987).

LIFE CYCLE—STEP THREE: TENURING THE PROFESSOR

B. A LEGAL ANALYSIS OF THE TENURE ISSUE—A PSC PERSPECTIVE

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INTRODUCTION

It is often said that academicians live within the sanctuary of the ivory tower. If I have learned anything as a union attorney exclusively representing academics for over eleven years, it is that there is nothing sacrosant about life within its walls.

My commitment to the concept of tenure is based not as an end to job security. Job security in other employment settings is a valid enough end in and of itself for a union to achieve. But tenure in higher education has a special value. It is an essential element of academic freedom, which is an indispensible hallmark of a free society. Without guaranteed freedom for intellectual inquiry and discussion in our academic centers, democracy would shrivel and die. For that reason especially, then, the issue of tenuring the professor takes on special importance.

The spirit of free inquiry impacts on the society at large. However, we should not be so naive as to believe that what is happening outside the proverbial ivory tower does not affect what is going on or what will go on inside. This paper will address some issues involved in challenging a denial of tenure in the system as it is currently constituted; and it will offer a suggestion for improving the process. But because I believe that current trends outside academe are going to affect tenure itself, improving the process now is even more compelling than if we were considering the subject in the abstract.

THE EXTERNAL ENVIRONMENT

There are ominous trends that loom outside the ivory tower which impact on the employment relationship. First, for some time now we have lived in a throwaway society of toss-away wipes, disposable diapers, and styrofoam cups. The latest addition to the garbage heap, unfortunately, is the human being, especially the unemployed and the homeless. Second, it is indisputable that the firing of more than 11,000 air traffic controllers following the 1981 PATCO strike symbolized both an anti-union and anti-worker bias that was to set the tone of the 1980's. Third, there is present an anti-worker bias as witnessed by the brunt of economically motivated decisions that seem to fall on the shoulders of working people.

Fourth, there is another serious undercurrent in the world outside of the academy that deserves attention in a discussion on tenure. As a high school student in the 1960's, reading George Orwell's foreboding vision of 1984, the picture he painted seemed to foretell an unlikely, distant future. Yet, 1984 is now the past, and the present is filled with evidence of Orwellian intrusion, governmental and otherwise. In 1985, self-appointed guardians of the faith, arrogating unto themselves the name of Accuracy in Academia, announced that they were dispersing student spies in college classrooms, targeting leftist professors.

In addition to the anti-worker biases cited above, there are other events that impact on the professoriate. These include:

1) In 1986, the U.S. Supreme Court said that the government has the right to examine and criminalize the bedroom activity of consenting adults.[1]

2) Workers in a wide variety of contexts have been required to provide employers with urine samples; the presumption of innocence and the original intent of the framers of the Constitution be damned.

3) Chapters on the compulsory provision of blood samples both for AIDS testing and genetic screening for other diseases are only beginning to be written.

The atmosphere that has saturated corporate America — that an employee is a throw-away commodity to be disposed of like a soiled Huggie — is beginning to permeate and will continue to affect decision-making by university administrators. Let us not forget that many university trustees in the private and public sectors come from corporate America. And, like the corporate axe, there will be pressure to reduce or eliminate tenured positions, undoubtedly in the name of efficiency and economy. Tenure as a concept will come under attack, while particular tenured positions will come under scrutiny.

What may also accompany the move to streamline and economize — depending, in part, on crucial developments in the economy — is a witch-hunt by the forces of intrusion and the self-appointed guardians of the true and correct faith, who will use the economic axe as the excuse to truncate unacceptable views. It is in the context of such looming considerations that the process of granting tenure must be weighed.

CHALLENGING TENURE DENIAL: WHERE DO WE START? WHAT DO WE GET?

Since union attorneys have little to do with the granting of tenure and very much to do with its denial, we begin with the question of where one should turn when tenure has been denied. What avenues of redress, if any, are available? Currently, there is a battery of confusing possibilities within which one might be able to bring a challenge to a tenure denial.

In the first instance, the college — in its bylaws or governance plan — may provide for an internal appeal procedure. Usually, such a route considers academic merit without regard to procedural deficiencies in the original decision.

Where there is a unionized faculty, the grievance procedure specified in the collective bargaining agreement should be read immediately. Grievance procedures often have specified time limits for filing grievances, and usually, if not always, provide for a final arbitration step before a neutral party, mutually agreed upon by the parties to the contract. The collective bargaining agreement itself is a rich source of a faculty member's rights. One should not wait until being denied tenure to become familiar with its terms.

If prohibited discrimination is alleged to have been the cause of the tenure denial — on the grounds of race, color, creed, sex or national origin — that claim is cognizable under federal law, Title VII of the Civil Rights Act of 1964.[2] And there is a specific filing procedure and a time limit to file a complaint with the U.S. Equal Employment Opportunity Commission.[3] Individual states and localities often have adopted their own anti-discrimination statutes as well, some including additional grounds of protection such as marital status and sexual preference. These statutes also provide for a forum and specify a time limit within which to file complaints.

Union contracts usually, if not uniformly, have an anti-discrimination provision, which, therefore, provides yet another forum to challenge a tenure denial on this ground. The U.S. Supreme Court held in 1974 that one may pursue a grievance alleging discrimination as well as file a human rights forum complaint on the same discrimination allegation.[4] If dissatisfied with the result from the various human rights avenues or if a specified period elapses without action on the part of the agency, a complainant may sue in federal court under Title VII. But one must first obtain a "right to sue" letter.

When a tenure denial is based neither on an allegation of discrimination nor on a violation of union contract, the question arises: Can we go to court to sue? The answer could be the topic of an entire conference. The subject of federal jurisdiction is, itself, a complete course in law school. And even after taking that course one has only scratched the surface. Some observations on this point begin with the recognition that there are formidable obstacles to achieving success in court concerning tenure denials.

First, as a result of the two 1972 U.S. Supreme Court cases, Board of Regents v. Roth[5] and Perry v. Sindermann[6], it is unlikely that a federal court has jurisdiciton to consider the case at all. In Roth and Sindermann, the Supreme Court ruled that a denial of tenure is neither the loss of a "property" right nor the deprivation of "liberty" within the meaning of the 14th Amendment. The 14th Amendment guarantees that no state "...shall deprive any person of life, liberty or property without due process of law...". On this basis, the person denied tenure cannot get into federal court. However, the Court did create an exception or two. If the person denied tenure was charged with something stigmatizing — something that would damage his/her good name, reputation, honor or integrity — then that person should have been afforded constitutional due process prior to the denial: notice and an opportunity to be heard.

The Court also said that if the person denied tenure could show facts and circumstances — via college rules and understandings — that showed a claim of entitlement to continued employment, a de facto tenure situation, then this would constitute a property right which could not be taken away without due process: again, notice and an opportunity to be heard. So, if the claimant can allege that a tenure denial was based on either scenario, he/she may survive a motion to dismiss. If one has enough proof, one might even win. Now we reach the next major obstacle: What do we win? What is the remedy?

Courts almost uniformly state that they will not second-guess the academic decision-makers with respect to whether a person wrongfully denied tenure on due process grounds ought to be granted tenure on academic merit. From a union lawyer's viewpoint, the possibility of having the matter remanded back to the institution that denied tenure in the first place — something courts have done — is not a remedy at all, but the kiss of death to the tenure candidacy.

The manner in which the remedy is addressed within the grievance and arbitration process in the Professional Staff Congress/City University of New York bargaining unit should be of interest here. To understand it adequately, however, we must go back to 1972, which was not only the year of *Roth* and *Sindermann*, but was also the year of the *Legislative Conference* case.[7]

That decision by New York State's highest appellate court arose in the context of an arbitration proceeding between the predecessor of the Trustees of of the City University of New York, the Board of Higher Education, and a predecessor of the Professional Staff Congress, the Legislative Conference. The Board of Higher Education moved to vacate an award of an arbitrator that had determined that the denial of a faculty member's reappointment candidacy was defective. The arbitrator directed reappointment. It just so happened that a reappointment then, by operation of law, would confer tenure. The New York Court of Appeals ruled that because of both the New York State Constitution — which required that the appointment of public employees be made upon a determination of merit and fitness — and the New York State Education Law — which delegated that appointment authority to the Board of Higher Education — an arbitrator did not have the legal authority to direct a reappointment that would result in tenure.

Faced with the court's ruling and the very real need to provide an avenue of redress to a tenured candidacy irreparably damaged by a college, the parties to the next collective bargaining agreement negotiated a bifurcated process. First, the arbitrator determines if the grievant's tenure candidacy was the result of contract violation or arbitrary and discriminatory application of procedure. If the arbitrator sustains the grievance and finds that there is a likelihood that the college which denied tenure cannot reach a fair, untainted academic judgment, then the arbitrator remands the matter for the making of the academic judgment to a Select Faculty Committee.

A Select Faculty Committee is a three-person panel of jointly agreed upon CUNY associate or full professors with tenure. The three are chosen from a larger panel of approximately 100 faculty members agreed to during negotiations. The Committee convenes with the same materials to review as were available to the college president at the time the grievant's tenure candidacy was originally considered. In addition, the committee has a copy of the arbitrator's award. The Committee then makes a decision on the academic merits.

To overcome the *Legislative Conference* case considerations — that the university trustees are the statutorily mandated appointment makers — the Select Faculty Committee's decision is forwarded to the university's chancellor. Select Faculty Committee decisions are then favorably recommended by the chancellor to the CUNY Trustees, who then vote to implement the reinstatement with retroactive tenure. Back pay restitution is thereafter calculated and paid. This system by and large works well, but it is nevertheless, a cumbersome and lengthy process. And while the ultimate victor is generally pleased, you might well imagine the sense of let down and frustration of the loser.

TO IMPROVE AND STRENGTHEN THE PROCESS

At the outset, I promised to offer a suggestion to improve the tenuring process, especially, in light of the external forces that may affect tenure. For over 11 years, I have heard the arguments for and against the confidentiality of the decision-making procedure of peer review and the division of every faculty member's file in two: one available for inspection, the second not. From the standpoints of due process and sound academic decision-making, it is logically indefensible not to:

1) establish and disseminate uniform criteria upon which the tenure decision will be made;

2) guarantee evaluation procedures that are fair and open;

3) prevent unseen materials from being placed in one of two files; and

4) provide open access to that one file. It is indefensible then to keep a second file beyond reach and to cloak the decision-makers in an overflowing academic gown of secrecy and innuendo.

Secret files and meetings are anachronistic, inimical to due process, and antagonistic to a free and open democratic society. They offer both the fact and appearance of wrongdoing. They do nothing to instill confidence in the process or the result, especially when the decision is negative. They are particularly dangerous during a period when considerations other than academic are likely to be introduced as the basis for tenure denials.

The courts, indeed, have been reluctant to enter the realm of academic judgment. But, I believe they can be coaxed to enter if it can be proved that decisions were wrongfully made on the basis of denial of free speech or association.[8] Maintaining confidentiality, however, handicaps the protection of the free exchange of ideas. It gives sanctuary to those who would evoke some brand of morality to conduct their nasty business in secret or who are too cowardly to be accountable for what they believe.

The time to improve the system and to provide adequate safeguards is before the crisis strikes. That time is now.

FOOTNOTES

1. Bowers v. Hardwick, 478 U.S. ____, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

2. 42USC 2000e, et seq.

3. 300 days in a deferral state, i.e. where the state has adopted its own mechanism for challenging prohibited discriminatory actions.

4. Alexander v. Gardner Denver, 415 U.S. 36 (1974).

5. 408 U.S. 564.

6. 408 U.S. 593.

7. 31 N.Y.2d 926 (N.Y. Court of Appeals, 1972).

8. See, for example, Pickering v. Board of Education, 391 U.S. 563 (1968).

LIFE CYCLE—STEP THREE: TENURING THE PROFESSOR

C. LEGAL ISSUES IN TENURE IN THE MASSACHUSETTS COMMUNITY COLLEGE SYSTEM

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Mass. Regional Community College System

The fifteen community colleges in Massachusetts were originally organized as a system separate from the state colleges and separate from the universities. In 1981, they came under the authority of the Board of Regents Higher Education in Massachusetts. So, when I refer to the System, I really mean the community colleges although technically that is not correct.

We have tenure in the commuity colleges in Massachusetts, however, my question is whether or not it really has any legal significance in our system given the provisions in our Collective Bargaining Agreement. In the statute that creates the Board of Regents, the power to appoint, transfer, dismiss, promote, and award tenure to all personnel of the community colleges, subject to the policies promulgated or agreements entered into by the Board of Regents, was vested in the Board of Trustees at each individual community college. It is the Board of Regents, however, that is the statutory employer for the purposes of collective bargaining by the specific provisions of Massachusetts General Laws Chapter 150E, which provides collective bargaining rights for public employees in the commonwealth.

The faculty in our system are organized into one statewide bargaining unit which was originally certified in 1975. The current Collective Bargaining Agreement, which is arguably the 1983-1986 agreement since we are still at the table, contains specific provisions and procedures regarding the granting of tenure. By contract, the decision to deny tenure is arbitrable, but non-binding. There is much decisional authority in Massachusetts regarding the delegability of the decision to grant tenure by elementary and secondary school committees; this authority may not be delegated or bargained away. The decisions hold that the granting of tenure should be beyond the scope of any arbitration award. This has arguably been recognized by the courts in Massachusetts as being applicable to public higher education as well.

THE TENURE PROCESS

In spite of major statutory, decisional, and contractual protections, the experience of the Massachusetts community colleges is that only a handful of those who are eligible, and I mean a very small number, are ever denied tenure. Now, this may indicate one of two things. It either indicates that the system is working very well, or it is not really working at all.

Our contractual procedures are very straightforward. Unit members are eligible to be considered for tenure during their sixth year of employment in the unit, if at least three of those years are in the same job function. Our unit consists of both faculty and professional staff which would include counselors and librarians. We needed to put that in. Candidates for tenure must have received other than an unsatisfactory evaluation on their most recent performance appraisal and must also have obtained the rank of assistant professor, or in the case of professional staff, professional staff level two. Both the immediate supervisor and a committee, composed entirely of elected unit members, forward separate recommendations for tenure and/or a one-year terminal contract to the appropriate dean who reviews all the recommendations and consults, where practical, with both the chair of the committee and the immediate supervisor. The dean then forwards his or her recommendations to the president of the college who makes the final recommendations to the Board of Trustees. All of these recommendations are based on the personnel file. We only have one and it is wide-open to the unit members. Additionally, all of the people sitting on the committee have access to that material as well.

Reaching the eligibility stage, therefore, becomes the key consideration to the awarding of tenure. The Collective Bargaining Agreement provides for a three-year probationary period although the term "probationary period" does not appear anywhere in the contract. During those three years, no reasons are required for nonreappointment. Although there are no really reliable statistics in our system, it does not appear that this probationary period has been widely invoked. I know that in some cases, individuals, when faced with the possibility of nonreappointment, will opt to resign rather than be nonreappointed. It will not surprise you, I am sure, to learn that of those few nonreappointments during the first three years of employment, some have been litigated in several forms, including arbitration in spite of the contractual protections and the Massachusetts Labor Relations Commission.

In one arbitration case that was ultimately decided in favor of management, any procedural defects in the decision to nonreappoint in the first three years were found to be arbitrable. In spite of clear contract language providing that for nonreappointment during the first three years, "...there shall be no necessity to provide reasons nor shall the grievance be subject to the procedure...", the arbitrator held that there must be something in the personnel file to justify the decision even if information outside the personnel file was also considered. There is clearly an emphasis here on documentation. The only way that management prevailed in this case was that the procedural defects, errors, and other contractual violations in the process which the arbitrator spent much time addressing in his opinion, were found to be harmless error.

Another nonreappointment in the first three years was litigated in a different form, by the labor relations commission. The individual in question happened to be the grievance officer during his third year appointment after which he was going to be nonreappointed. A prohibited practice charge was filed alleging that this nonreappointment was the result of protected union activity. The union claimed it was because he was, of course, the grievance officer. Although the number of grievances filed during the period he was grievance officer diminished from the previous grievance officer, the college maintained that the decision to nonreappoint was performance based. After an investigatory hearing at the commission level, charges were filed and the college decided that it would be better to settle than fight. The individual was reappointed, but there was a joint letter issued to the college community from both the college president and the president of the local chapter indicating that the individual in question was going to work on improving some aspects of his performance and that the individual concerned was committed to taking those steps.

The key part to our process is that after the three-year probationary period provided by the Collective Bargaining Agreement has ended, nonreappointment in the fourth year is subject to the exercise of professional judgment. In the contract there are protections for management that the arbitrator may not substitute his or her judgment for the person exercising his or her professional judgment. There must be a statement of reasons accompanied by this nonreappointment. Nonreappointment in the fifth or subsequent years must be for just cause. Arguably then, the granting of tenure in our system gives no additional employment rights or protection. Any decision to terminate the employment of a faculty or professional staff unit member for just cause would, more than likely, overcome the tenured status as well.

THE EVALUATION PROCESS

The other very important piece of this process is the evaluation system. How do you evaluate the faculty? How do you make the decision to appoint or nonreappoint? Evaluations have not been arbitrable in our system until the 1983-86 bargaining agreement. We now have some evaluation cases in the pipeline although the substantive aspects of evaluation have not yet reached arbitration.

We did have one case involving evaluations in general. The union raised the issue that we were inappropriately using a hierarchy of adjectives in our evaluation so that it would be easier to compare one faculty member to another when making personnel decisions. The arbitrator found that the hierarchy of adjectives was not appropriate given the bargaining history. Management had tried to get catagories in the evaluation system and had withdrawn from that position and used a narrative format. We could use whatever adjectives we wanted as long as we did not try to rank them. We call those curious decisions when management loses.

Decisional authority appears to be very sparse in this area of evaluations. I am not sure if this is a result of most contracts providing that evaluations are not arbitrable, or whether faculty deem it unseemly to grieve an evaluation. Perhaps, there is a provision in the Collective Bargaining Agreement for a statement in response to an evaluation and, thus, there is no necessity to grieve. In those grievances that have arisen, one major issue predominates: the criticism of a faculty member's teaching performance, where the faculty member argues that this is unduly impinging on his or her academic freedom as protected in the Collective Bargaining Agreement. Teaching methods, along with selection of texts, are claimed by the union as being sacrosanct under the contract. However, the evaluation article provides that one of the criteria to be considered when evaluating a faculty member is the development and improvement of instructional methodology which can be distinguished from teaching methods. This issue has not been litigated in the community colleges to my knowledge.

College administrators, when reviewing the performance of faculty members, must also take into account factors such as student retention. This clearly becomes an important concept in the community college setting where faculty are dealing with students ranging from the best and brightest to those who need remedial work before they are prepared to have higher education spoon-fed to them. If you have a faculty member who seems to be meeting all of the contractual evaluation criteria, who has, for example, a 60 percent dropout rate and, of those people who remain in the class, only 40 percent of them pass, that means you have a continuing pattern. There is a problem here.

Another issue that you face in the evaluation process, as you would during any normal tenure process, is discrimination. You can face it in any personnel action, but certainly in the evaluation process. You, therefore, need to be uniform in applying the standards by which you evaluate your faculty and be able to defend those decisions and evaluations.

If there is a flaw in our system, and I believe this would be the factor in any institution, it is, in fact, the implementation of the evaluation process. The goals of clarity, consistency and fairness should be sought in any evaluation process. Whether it is a faculty member, a custodian, or a computer programmer who is being evaluated, the principles are equally applicable. However, this goal cannot be attained when an individual with supervisory responsibility either does not take it seriously or does not have the training or ability to evaluate properly. When I say properly, I am looking at this, again, from a legal perspective: Can you defend the choice? Can you articulate differences? Can you document or defend the judgments that you are making in very clear terms?

In summary, if management is doing its job properly in terms of evaluating the individual from the very beginning, the granting of tenure should not be an issue. It is essentially not an issue in our system. Determination should be made long before the stage is reached at which someone who had been working for five or six years is suddenly informed that they no longer have further employment at the institution.

LIFE CYCLE—STEP THREE: TENURING THE PROFESSOR

D. ISSUES IN TENURING: A FACULTY UNION LEADER

Josephine Reiter
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Framingham State College
Chapter President, MSCA/NEA

I am here today, not as a scholar-performer-teacher of Mozart and Beethoven and the eighteenth-century Viennese School (where my heart is), but as a faculty union leader who represents the faculty and professional librarians in grievances concerning evaluations to determine reappointment, promotion, and (ultimately) tenure decisions. My remarks are based on my experience at a Massachusetts state college (one of nine) and as a member of a state-wide grievance committee which determines what is and what is not arbitrated.

THE CONTRACT

The contract that governs our tenure decisions has the rank of assistant professor as the tenure eligibility rank and the fifth year as the tenure evaluation year. Hence, a person in a tenure-tract position hired as an instructor is given a one-year contract for the first three years, is evaluated for promotion to assistant professor in year four, and then (and only then) is evaluated for tenure in year five. If the tenure is denied, year six becomes a terminal year.

PROBLEMS

The problems encountered in tenure decisions begin with hiring. The Appointment and Promotion Article of the contract (Article XX of the Agreement Between the Regents and the MTA/NEA) delineates the eligibility standards for each academic rank; they are three-fold: earned degrees, teaching experience, and meritorious performance according to the criteria articulated in the Evaluation Article (Article VIII). The evaluative criteria for all personnel actions, i.e., for reappointment, promotion and tenure, are the same. They are teaching, advising, scholarship and service. What distinguishes the tenure evaluation is that the review period covers the candidate's entire career at the college and the judgment is based on potential as well as achievement.

If by "problems", we are referring to issues which lead to tenure denial arbitrations, there are relatively few. The Massachusetts State College Association (MSCA) has arbitrated eight tenure denial grievances over its ten-year existence as a state-wide union. There have been none from my campus. I will attempt to explain why.

LEGALISTIC EVALUATION PROCESS

In answer to the question, "Is the evaluative process too legalistic?", I respond, "no". What makes our contract so effective (and accounts for so few arbitrated grievances on tenure denials) is the section of the Evaluation Article entitled "Basis for Personnel Actions" (VIII, I). The contract stipulates in this article:

> 1. It shall be the responsibility of any unit member who is a candidate for reappointment, promotion, or tenure, to verify and demonstrate that he/she has fulfilled the criteria that pertain to the personnel action for which he/she is a candidate.
>
> 2. Whenever a person or body makes a recommendation to reappoint, promote, or grant tenure, to the next person or body required to act, such recommendation shall be made in writing and shall set forth clear and convincing reasons in support of such recommendation.
>
> 3. If any person or body recommends that any member of the bargaining unit not be promoted, reappointed or granted tenure, he/she or it shall, when transmitting such recommendation to the person or body next required to act thereon, also transmit to such person or body a written statement setting forth fully and completely the reasons therefor, a copy of which shall be sent to the unit member.

In addition, the contract includes the following language in the introductory section of the Tenured Article (IX, paragraph three of the Introduction):

> The serious decision of granting tenure demands that the President, before making recommendations to the Board, have substantial evidence, determined through professional evaluation, that the candidate will be a constructive and a significant contributor to the continuous development of high quality education in the institution. It is the responsibility of the candidate for tenure to produce such substantial evidence based on his prior academic and professional life.

The contract then places responsibility on the candidate to produce such "substantial evidence" needed by the president to make the tenure based on the candidate's prior academic and professional life; and the contract also places the burden of producing written reasons on those making the academic judgments — the department chair, the Tenure Committee, the academic vice president and the president.

This evaluation process works most of the time. I believe it does so because it places the responsibility for documenting and validating what is in the dossier on the candidate and requires those making the academic judgments on merit to hold to a standard in their written reasons: "clear and convincing" for positive recommendations and "full and complete" for negative recommendations.

Another reason for the evaluation procedures' effectiveness is that it provides for due process from the initial recommendation of the department chair through to the academic vice president's recommendation — by providing for a written response or rebuttal by the candidate and also by allowing the candidate to call for an ad hoc peer review committee to evaluate and recommend along with the department chair. These due process procedures eliminate many potential grievances because the rebuttals and peer review evaluations and recommendations remain in the official personnel file along with the disputed negative recommendations. Indeed, often the person or body next required to act has reversed a decision.

PITFALLS

The pitfalls that recur as department chairs and peer review committees and academic vice presidents make their recommendations tend to involve procedural oversights, failure to communicate on the part of supervisors and unit members, and poor hiring practices. The following examples are illustrative of personnel grievances that I have processed and, together with management, have resolved prior to developing into full-fledged tenure denial cases.

Five promotion denial grievances (four in one professional studies academic department and one in a social science academic department) centered on the candidates' failure to have the appropriate degree requirement (and graduate credits beyond the master's degree) to qualify for promotion to assistant professor, which is the tenure eligibility rank. To return to my assertion that the tenure problems begin with hiring, I offer these five examples. If the candidates have been hired with the advanced degrees earned instead of the minimal qualifications for the entry rank, the credits would not have been lacking. The resolutions of these five grievances involved an adjustment of the time-lines during the evaluation year and/or the candidates taking an unpaid leave in which the necessary credits were earned.

My assertion that tenure problems develop in the reappointment evaluation may be seen in the following examples of non-reappointment grievances (one in a science-mathematics academic department and the other in a social science academic department). The science-mathematics department instructor's grievance involved the chair's failure to handle a pedagogic problem properly. With no indication of dissatisfaction (either oral or written), a faculty member does not know of a need to improve during the probationary period. This instructor received the negative recommendation to not reappoint with no warning. The resolution involved a reappointment, a positive letter of recommendation from the chair concerning the professional competence in the discipline of the candidate (no mention of the teaching ability of the instructor), followed by a letter of resignation from the candidate.

The social science department instructor's grievance involved a chair who ignored three course sections of overwhelmingly positive student evaluations (on contractual forms) in place of two individual student complaints. It was complicated by the fact that the ad hoc peer review committee overturned the chair's negative decision and the union encountered a problem in getting a copy of the negative student complaints. The remedy, once more, involved a decision on the part of the faculty member to leave the institution. Hence, a reappointment, along with a letter of recommendation from the chair concerning the professional competence of the instructor in the discipline, was followed by a letter of resignation.

CONCLUSION

For a faculty member to teach, advise, demonstrate commitment to the discipline through scholarly activities, and provide service to the college community and to the public for five years with no dissatisfaction with his/her work expressed and no negative evaluations, and then to be given a one-year terminal contract (i.e., to be denied tenure — to be fired), makes a mockery of the evaluation process and the criteria for professional and academic standards of the college. Such a tenure denial treats the individual professor according to the laws of the marketplace: money can be saved by not tenuring; a superior candidate may be found. This is inhumane management — it does not serve the overall good of the professoriate nor of the institution. If the college recruitment and selection procedures are sound, the contract has been followed for reapppointments and promotion, and the recommendations have been positive, virtually all new faculty members should receive tenure.

VII. LIFE CYCLE—AT ANY TIME
FACULTY ON STRIKE: IT COULD HAPPEN TO YOU

A. ACADEMICS ON STRIKE: THE CHICAGO CITY COLLEGES EXPERIENCE—A FACULTY PERSECTIVE

Norman G. Swenson
President
Cook County College Teachers Union/AFT

THE 1966 STRIKE

My attitude towards college teacher strikes is highlighted by the jail terms I served for heading two strikes in the Chicago City Colleges. The first strike was in October-November, 1966. The strike lasted five days and resulted in an agreement with our Board of Trustees to negotiate a collective bargaining contract with our union. Prior to the strike, the Board's position was: (1) it recognized our union for exclusive bargaining purposes; (2) it would not reduce our "discussions" to writing and it would not incorporate the verbal agreements in a binding, bilateral collective bargaining contract. Our strike did not produce a contract. It did produce a largely procedural agreement that committed the Board to good faith bargaining and the promise that it would sign a collective bargaining contract.

The strike also produced an immediate injunction. On the first day of the strike, the Board obtained ex-parte a temporary restraining order to end the strike. When I refused and said only the membership could call off the strike, he held me and the union in contempt of court. I was sentenced to 30 days in Cook County (Illinois) jail and the union was fined. In 1971, after my appeal to the U.S. Supreme Court was rejected, I served the 30 days on tier G-3 of the old jail. I served the 30 days "flat" without "good time" because my contempt was neither strictly civil nor criminal in nature. As an action that came under the jurisdiction of the chancery court, my contempt sentence was not subject to the "good time" sentence reduction of five days per month provided by the criminal statute.

THE SECOND STRIKE

The second strike which resulted in a jail sentence was in 1975. The Board had launched an all out assault on our contract and had hired a notorious union-busting law firm, Seyfarth, Shaw, Fairweather and Geraldson, that had successfully broken a number of public and private employee strikes. They advised the Board to cancel our contract after it expired on June 30, 1975, and hoped to force us to negotiate a new contract based on new Board rules that gutted our old contract. We struck when the fall semester began and vowed to stay out until our old contract was reinstated.

The Board obtained a temporary restraining order which the union violated by continuing the strike. While the strike was still on, the union and I were found in contempt of court. I was sentenced to five months in Cook County Jail and the union was fined $60,000. I was immediately hauled off by bailiffs to begin serving my time in jail, and the union's assets were attached to pay the court fine. Contrary to the judge's, the Board's and their lawyer's expectations, these draconion measures only served to galvanize the striking faculty members in their determination to support their union and stay on strike until the old contract was restored.

Our bargaining team refused to meet separately from me with the Board negotiating team. Our Chancellor refused to come to the jail to negotiate, so negotiations were at a standstill until the Board arranged to have me released in handcuffs on a "work-release" program, so negotiations could take place outside the premises of the jail. I had refused bail without such an arrangement because I knew that had I been released on bond and was no longer an inmate of the jail, I could be subject to further counts of contempt and additional jail sentences.

The strike was settled after 22 days with the restoration of our old contract, plus economic gains. The judge, however, refused to grant me bail, and I had to appeal to the Illinois Appellate Court. The Appellate Court overruled him and granted me bail while I appealed my sentence. I also launched a clemency campaign that involved hundreds of letters and telegrams to the Governor. After a six-month campaign, Governor Daniel Walker approved commutation of my sentence to time served.

THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT

Throughout the period of the 1966 and 1975 strikes, public policy in Illinois, as articulated by numerous court decisions, held that teachers' strikes were illegal. Teachers who struck could be and were enjoined, held in contempt of court, fined and jailed. But the teachers' strikes continued despite court decisions and began to increase in number. At the same time, there was no teachers' labor relations statute in Illinois which would povide alternate methods of obtaining collective bargaining and a contract. Without such a law, most college and university boards refused to voluntarily grant their faculty unions exclusive bargaining rights and sign a contract.

The Illinois Federation of Teachers (IFT), our state affiliate, could have accepted a weak law without the right to strike and with statutory penalties for striking. We rejected a number of such legislative proposals by our competitor, the Illinois Education Association (IEA). The IEA wanted a weak law without the right to strike because that would have allowed it to lock in its weak locals which were rapidly defecting to the more militant IFT. During the period between 1966 and 1984 before a teachers' labor relations act was passed in Illinois, the IEA lost locals and recognition in many community colleges and K-12 districts. It also lost thousands of members. In 1966, IFT membership stood at 20,000; IEA membership was 85,000. Today the two organizations are about equal in size.

On January 1, 1984, the Illinois Educational Labor Relations Act (IELRA) became law. The IELRA is one of the few laws in the United States that permits legal strikes as the final step in bargaining. The law prohibits injunctions or penalties for striking unless the union has been found guilty of an unfair labor practice. So far, the Labor Board has not found a teachers' strike to be illegal because of such a practice.

THE "RIGHT TO STRIKE"

Is the Illinois law a relic of an ancient age, a dinosaur of the past, or a harbinger of the future? The vast majority of states outlaw teachers' strikes and provide severe penalties for striking. Our statute has been described as "strike driven", i.e., if there is an impasse in negotiations, that impasse is resolved by the ability of our faculty union to strike and the ability of our college Board to take a strike and/or to find "temporary" replacements.

So far, our union and the IFT have fared well under the law. Even small IFT affiliates at Morton College (64 full-time faculty) and Lakeland College (80 full-time faculty) have been able to strike successfully for up to four weeks and win respectable settlements. The IEA now has a K-12 strike in Homer, Illinois which has been broken. A number of the district's teachers crossed the picket line last October when the strike began. The 25 teachers who remain on strike have been replaced by "temporary" teachers. The IEA is now supporting legislation which would prohibit teachers' strikes and provide instead for binding arbitration of a contract dispute. The IEA favors such legislation because it would avoid the organizational problems it has in trying to negotiate hundreds of contracts without the ability to strike. Binding arbitration of negotiations' impasses would turn bargaining over to the IEA's lawyers. With unlimited agency fee income from its affiliates, it can hire platoons of lawyers to arbitrate contract disputes. It will never lose a local or a contract because of its inability to strike successfully.

For our part, we are absolutely opposed to legislation which would outlaw our right to strike. We believe the right to strike is a fundamental prerequisite for a free trade union movement. The right to strike assumes equality and freedom in the bargaining relationship. It assumes that a faculty can democratically determine their professional concerns. It assumes, most importantly, that lawyers and legislators and arbitrators cannot take over the bargaining process and dictate rules and penalties for the academy.

LIFE CYCLE—AT ANY TIME
FACULTY ON STRIKE: IT COULD HAPPEN TO YOU

B. ACADEMICS ON STRIKE: THE FAIRLEIGH DICKINSON EXPERIENCE—A FACULTY PERSECTIVE

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INTRODUCTION

A strike is a crisis in human relations. It knots together legal aspects of employee-employer relations with the kind of emotional stress sometimes associated with revolution. It is a collective act. To be successful as an instrument of policy, it must result in a redefinition of the relationships which gave it birth. The faculty of Fairleigh Dickinson University (F.D.U.) struck from September 3 to September 9, 1986. The ramifications of its act are still being felt.

In the course of this paper, I shall undertake to respond to the questions posed in your program. I shall reorder them slightly by placing the last one second in line and, being a historian by trade, I shall spend a good deal of our time on causation which is the key to understanding this particular event. At the end, I shall briefly sketch the situation as it stands at present.

I. WHAT ARE THE EVENTS LEADING UP TO MAKING A DECISION TO ENGAGE IN A STRIKE?

Our decision to strike grew out of the particular circumstances present in the fall of 1986 which, in turn, reflected those of our institution's origin and growth. F.D.U. was established in 1942 and it expanded enormously, some would say recklessly, during the period of the G.I. Bill and the baby boom. During this period, enrollment was constantly increasing and the horizon appeared infinite. Tuition income was ample to meet financial needs and there was, correspondingly, little impetus to look beyond this apparently boundless resource.

Our founder was, as founders tend to be, both strong-willed and paternalistic. The faculty responded to this by seeking to affirm its rights and to elevate its status to a position comparable to that of our sister faculties in more established institutions. In 1973, we voted overwhelmingly for collective bargaining and, over the next decade, we hammered out a model contract covering all aspects of the faculty's role within the University. This document became, for all intents and purposes, our constitution, the touchstone for decision-making and the fulcrum for faculty-administration relations. Sanctioned by the Board of Trustees, it had been a product of, and held the respect of, both parties.

A. Demographic and Financial Concerns

In the 1980s, there occurred two fundamental events which were to change all this. The baby boom gave way to the demographic crisis which was for us directly translated into grave financial concerns. In addition, the Supreme Court held in its Yeshiva decision that, given certain conditions, college and university faculty can be adjudged to be in a managerial role and can consequently be deprived of the protections of the National Labor Relations Act. The Fairleigh Dickinson faculty was soon to find itself caught between the legal hammer and the financial anvil.

Out of the financial crisis there emerged a "lifeboat" scenario. Revenues fell in direct proportion to enrollment and, with little or no endowment to cushion the fiscal blows, the administration resorted to across-the-board cuts in the budget and, with the reluctant assent of the faculty, jettisoned some administrators, selected programs, and part-time faculty. Such measures eased, but did not resolve, the financial problem exacerbated for us by our position as a "back-up" institution for potential students. With everyone hit by the demographic slide, fewer students than ever had to resort to a "back-up" choice.

In 1983, in the midst of all this, the Board of Trustees elected a new chairman, an alumnus of F.D.U. and the chairman of the board of Allied-Signal. With a reputation, in his business career, as a "housecleaner", he brought to bear on our problems a point of view forged in the world of profits and profiteering. The "lifeboat" approach was given full rein. Cuts in budget were to be extended to cuts in personnel. Pink slips would have to go out. Administrators, uncomfortable with the new approach and identified with the period of fiscal decline, would go first. A clean sweep was made of the top ranks of the administration including the president. To form the proper backdrop for the resignations and dismissals, an outside consultant from the business world, Peat-Marwick, was called in to "restructure" the University. Next it was to be the faculty's turn.

But with the faculty there were special problems, legal problems. There was tenure. There was collective bargaining. Corporate offices have little direct contact with either. These two elements should have served as formidable barriers to a simplistic approach based on getting a quick financial fix to get through a tight period by slashing the compensation budget via dismissals. They might have done just that had it not been for the Yeshiva decision.

B. A New University President

On September 15, 1984, a new president took over the direction of the University in the midst of prolonged negotiations. Our contract had already expired on August 31, 1984. Under the constant threat of being "Yeshiva'd" and convinced that there was a bona fide need to reduce the ranks of tenured faculty, the A.A.U.P. negotiated and the faculty ratified a two-year contract incorporating a provision for forced buy-outs in departments identified as being "overstaffed". Tenure had effectively been breached by means of collective bargaining.

Between 1984 and 1986, approximately 20% of Fairleigh Dickinson's tenured faculty disappeared. The worst psychological effects of the process were mitigated by a comparatively sensitive handling of its implementation by remnants of the former administration. Nevertheless, extraordinary anxiety and considerable bitterness was generated among the faculty. A number of the union leaders most visibly connected with the 1984 negotiations either withdrew from active participation or were voted out of office. Hostility toward the new regime was widespread and hardly mitigated by what was seen as excessive expenses incurred from the paying, lodging, and installation of the new president and the new "team". To make matters worse, the new administrators appeared uncomprehending, uncaring, and remote.

It was against this background that the next negotiations approached. The contract called for them to begin no later than April 1, 1986. An anxious, sullen, and offended faculty faced an aggressive and unfamiliar administration which was soon to prove itself to have neither any understanding of nor any respect for the process of collective bargaining as it had evolved at our institution. The contract to them, apparently could be useful in weakening or abridging tenure. If it did not prove so, the usefulness of collective bargaining for them would be ended and they could always destroy the union by playing their "Yeshiva" card. The law, hitherto our staunchest ally, was now primarily a weapon in the administrative arsenal.

C. The *Yeshiva* Sword

In early March, the university president requested a meeting with the Executive Committee of the F.D.U. Council of A.A.U.P. Chapters. It was held on March 5, 1986. There, the President read us a manifesto which was immediately distributed to the faculty at large. His statement incorporated several demands as preconditions to negotiations and requested that we respond to them prior to the scheduled trustees meeting of March 12. At this session, he picked up a copy of our 1984-1986 agreement, gave it a toss, and announced that he had no intention of discussing "every jot and tittle" of what represented a decade of administrative-faculty effort. Instead, he presented each of us with a copy of his own creation which we forthwith christened the "Yellow Book" in honor of the color of its cover. This was to be our point of departure. If we did not comply with his wishes, we were informed that he would "counsel with the Board about future steps to be taken consonant with our (the administration's) legal obligations". The *Yeshiva* sword had been unsheathed.

The Executive Committee refused any preconditions to negotiations, but we affirmed that everything was open to reassessment. The first meeting of the two teams took place on April 10. Both chief negotiators were new to the job. The administration's was also new to the University having just been hired in the fall of 1985. Their team was, however, kept on a very short leash and, during the entire course of the spring and summer, the President continued trying to by-pass the negotiating process by continually taking his positions directly to the faculty. He was insulated against any action for unfair labor practices by our realization that such a move, on our part, would precipitate a jurisdictional dispute which could result in our decertification.

D. The Attack on Tenure

Under the circumstances, there was little impetus for the administration to bargain in good faith. The president felt he held all the trump cards — legal cards. His "Yellow Book" shot tenure full of holes. Under its provisions, dismissal could result from any number of delinquencies from failure to pass a proposed annual faculty evaluation to failure to report outside employment. Other dismissal causes were worded so vaguely, e.g. "personal misconduct", as to allow for virtual dismissal at will. Walkouts by the administration team were spasmodic with the longest one occurring during the crucial period from July 24 to August 20 leading us to request the intervention of a New Jersey State mediator. In spite of a series of last minute proposals and requests to extend the expiring agreement, the first day of classes approached with no resolution. On August 28, 1986, the faculty authorized a strike. Although mediated negotiations continued through the evening of September 2, it was to no avail. On the morning of September 3, the pickets were in place.

E. The Decision to Strike

Our decision to strike came about almost organically. Indeed, the thrust of our thinking throughout the negotiations was much more in the direction of avoiding a work stoppage than it was towards organizing one. It was the almost fatal intransigence of the administration's position which made our action inevitable. This intransigence appeared based on two considerations: (1) the President's confidence that he could not lose since he could always break the union via legal means if he could not bend it to his will and (2) his refusal, in the light of what appeared to be a parallel situation in 1984, to believe that the faculty would actually strike. Indeed, he insisted that I personally write him a memorandum on the evening of September 2 stating that we were determined to go ahead. Given such circumstances, progress at the table was well nigh impossible. We were faced with totally unacceptable demands which the administration felt itself under no pressure to modify. We were given no choice but to strike or to surrender.

II. HOW DOES ONE RECONCILE THE IMAGE AND IDENTITY ISSUE OF PROFESSIONALS ON STRIKE?

This can never be done fully, even with regard to the activists on the picket line and in the headquarters. Faculty members will always feel somewhat out of character walking around with signs attached to their bodies. To ask a faculty to strike is to ask a primarily cerebral group to engage in an act of passion, and to ask a group, proud of its individual identity, to act collectively. However, our faculty had been kept fully informed of the situation as it developed. They saw the administration's arrogant rejection of countless reasoned proposals. They understood that uniting for mutual advancement is an old American custom and that standing up for one's beliefs, even with signs, is acceptable behavior. The general feeling on the line and in the headquarters was one of solidarity and, indeed, many rifts dating from the events of 1984 were at least temporarily bridged. Seven years before, in 1979, many faculty had participated in our one previous strike. The situation in 1986 was much more threatening to both our personal and professional standing. In general, if a professional is presented with clear issues and a good cause, action will be forthcoming.

A. On Strike

The strike held up well during Wednesday, September 3, Thursday, September 4, and Friday, September 5. The administration, however, moved vigorously and ruthlessly to smash it. In addition to the posting of uniformed guards at all gates (a show of authority totally absent in 1979), they sent out letters to faculty homes threatening to replace anyone not back in the classroom on Monday, September 8, or on Tuesday, September 9. Certain selected faculty (myself included) had already had their places filled. So much for the sticks. As to the carrots, the president called a meeting for the full faculty to take place on Sunday, September 7. We urged the faculty to attend and held a rally just prior to the event. At this meeting, the president repudiated the tenure-breaking clauses of his proposal and pledged to honor the A.A.U.P.'s "1940 Statement on Academic Freedom and Tenure". He also vowed to return to the negotiating table and to bargain in good faith. He and the non-activist part of the faculty then withdrew. The rest of us stayed on to discuss the situation.

It was at this point that fissures began to appear among our three campuses and six colleges. Several faculty members spoke against continuing the strike on paedagogical grounds and in the light of a possible adverse economic impact if students began to leave. (There is no significant data to indicate that such would have been the case.) The Florham-Madison campus faculty, the most self-contained of the three, held its own caucus during which its original indecision about the advisability of the strike resurfaced. The combination of the fear engendered by the President's letters and the hope held out by his speech were having their effect.

B. The Settlement

Monday, September 8, saw a marathon meeting between the president and myself under the auspices of John F. Tesauro, Executive Director of the New Jersey State Board of Mediation. The session ran for some 12 hours virtually without interruption. During that time, I was receiving reports, as doubtless was he, that some faculty were returning to the job leaving those still on the picket line in an increasingly vulnerable position. Understandings were reached on many issues, most of which were resolved in the president's favor. An interim settlement was signed well after midnight which recognized the 1940 statement as binding and included a non-retaliation clause. Word went out that the faculty should return to the classroom as of Tuesday morning, September 9. The 1986 Fairleigh Dickinson strike was over.

III. FROM A RETROSPECTIVE VANTAGE POINT, WHAT MIGHT ONE HAVE DONE DIFFERENTLY IF A SECOND OPPORTUNITY PRESENTS ITSELF?

A. Organizational Structure

Many things might have been handled differently. My combining of the Council Presidency with the position of Chief Negotiator was certainly a mistake. At critical moments, it proved impossible both to keep up with developments on all three campuses and to carry on at the table. Structurally, a better defined liaison system to keep track of exactly who was and who was not teaching would have helped combat rumors on one campus that another was jumping ship. The existence of a tri-campus structure with intervening distances of 35, 30, and 10 miles made communications and the coordination of strike activities cumbersome. A more authoritarian and militant stance at the September 7 meeting might also have helped.

B. Mistaken Assumptions

But the single most detrimental factor throughout was the mistaken assumption that the administration would conduct itself in a gentlemanly and collegial fashion. The faculty was unprepared for the arrogance, for uniformed guards, and for the callousness of the replacement letters. The refusal of the administration to work within the legal structure of collective bargaining, to follow orderly and courteous forms, and to accept reasonable compromise was totally out of keeping with our experience in the world of higher education and was in direct conflict with our hopes for the new regime. We mistakenly searched for a reasonable middle ground long after it should have been apparent that the administration had no interest in attaining one. We should have spent our time building a stronger strike base instead of drafting revised proposals.

IV. WHAT CHANGES IN THE EMPLOYMENT RELATONSHIP OCCURRED AS A RESULT OF THIS ACTION?

A. The Long Run

In the long run, the strike itself caused little real change in employee-employer relations. The image of the administration as uncaring and uncompromising had been emerging steadily ever since 1983. The chairman's and president's distaste for tenure and unions simply took concrete form in the "Yellow Book" and in the filing of the decertification petition which took place on the very day, September 8, on which we were doing our best to reach an accommodation. It was not the strike but the condescending way in which negotiations were pursued, or, more accurately, the way in which they were not pursued, and the implacable stance on the Yeshiva petition which have poisoned faculty-administration relations in a way which far transcends the exchange of a few epithets in the heat of the moment. The chairman and the president are clearly bent upon totally smashing the ability of the faculty to act collectively and independently.

B. A National Problem

The strike at Fairleigh Dickinson was, therefore, a symptom of the continuing malaise afflicting the relationship of its administration to its faculty. But it is also symptomatic of a much wider set of problems afflicting American higher education, problems which transcend the current demographic crisis and which can outlive it. Boards of trustees are charged with creating an atmosphere conducive to the pursuit of learning by both faculty and students. They are, however, largely composed of business men and women unfamiliar with the customs and needs of an academic community. In the past, presidents and other administrators of our institutions of higher learning were often drawn from the faculty they governed, or a like one, and had a loyalty to it and to their institution. We are now beset with "professional", yuppie administrators who see their constituency as the board rather than the faculty, the students, or the institution as a whole. Besotted with visions of the next, more prestigious, and better paying job, and seduced by the model of the corporate C.E.O., they have little feeling for the institutions they temporarily (or so they hope) govern and feel free to exploit them to their own advantage.

C. A Look Ahead

It is into such hands that the financial crisis, combined with the Yeshiva decision, has delivered the faculties of our private universities and colleges who might otherwise have had infinitely greater resources via collective bargaining to resist the substitution of management control for collegiality and of coercion for leadership. There are now some signs that the Yeshiva doctrine is infiltrating into state-supported systems as in the case of the University of Pittsburgh. One can only hope that federal legislation will be promptly passed to dissipate the ever-thickening cloud of sophistry arising from Yeshiva and to the danger it poses to the freedom of faculties at our private colleges and universities to choose collective bargaining as a remedy to administrative ineptitude. Unless something such as this is done, one can expect what was done at Fairleigh Dickinson to serve as a grim example to higher education of how a decent, orderly, and equitable structure of faculty rights can be ruthlessly annihilated by perfectly legal means.

LIFE CYCLE—AT ANY TIME
FACULTY ON STRIKE: IT COULD HAPPEN TO YOU

C. ACADEMICS ON STRIKE: THE BELLEVUE COMMUNITY COLLEGE EXPERIENCE—A FACULTY PERSPECTIVE

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INTRODUCTION

From September 20th to the 29th, 99% of our faculty walked the picket line. There were no classes for the first time in the history of Bellevue Community College. Since a strike is probably an anathema to most higher education faculty, what would cause them to engage in such an activity? What was the context of this conflict? What was the local (and national) history? What was unique about the people and issues involved? I will try to explore these questions and describe the strike and its aftermath. I will also tell you how I reconcile being a professional as well as an employee who did and would again go on strike.

THE BARGAINING PROCESS

While national issues and trends held true for Washington State, they were exacerbated by a deeper recession than most states experienced, double-digit unemployment, and a volatile tax structure. At the same time, the state legislature passed a mandatory Basic Education law which allowed for little flexibility in funding K-12 and gave legislators few choices about where to cut when that was necessary. The last 15 years have seen a 20% cut in funding higher education in Washington with a corresponding 20-25% reduction in faculty buying power.

Within this national and state context let us look at BCC, a 20-year-old campus of medium size with a veteran faculty of 109 full-time and approximately 230 part-timer. The college is located in an affluent, rapidly growing, conservative suburb east of Seattle. Our local faculty association has consistently been the strongest higher education unit in the state with about 80% full-time membership. The strength of our local has come from strong leadership from many faculty members over the years. I would characterize our faculty as highly conscientious, professional, competent, independent, assertive and fairly conservative. They also have high standards for themselves, their students, and administrators; and with standards come expectations. We have not only expected, but when necessary, demanded as professionals, shared governance and equitable behavior from our administrators. Our faculty affiliated with the Washington Education Association (WEA)/NEA only after several years as an independent professional association and after extended review and debate between those who wanted to be tough teamster-member activists and those who wanted to be analytic observers of action in the AAUP. The WEA has been moving toward a healthy balance between being a union and a professional organization. We have consciously sought to validate and include both polarities within our faculty organization.

In 1979, the faculty at BCC took a 111 to 4 vote of "no confidence" in the president which led to his resignation. The issue was instructional reorganization and was seen as an attempt to impose a bureaucratic, "top-down" model of management which would make faculty mere "employees" in a tightly controlled bureaucracy. Through that period, we rediscovered that we could act in concert as a faculty to defend our professional values.

A few years later we almost went on strike when the president and board started to implement unilateral policies rather than continue to bargain. Washington State does not yet have a collective bargaining law for higher education. Rather, it has a "meet and confer" law which requires the district to meet, confer and negotiate and if resolution of conflicts cannot be achieved, the district can adopt policy. The history of our district had been one of negotiating in good faith and when serious threat was made to adopt policy, the faculty learned a sober lesson about bargaining power and the need for commitment and long-range planning.

Since that time, the current administration, though more subtle and politic, has too often had a style of management where decisions and information are too controlled from the top down. As a result, last spring the faculty felt alienated, unappreciated and not responded to by the administration and the board. The environment was conducive to apathy, low morale and frustration. All these factors were in the history and context. The events that precipitated the strike began in the Spring of 1986.

The contract development process in the Spring of 1986 was different in three ways: First, WEA had hired a new higher education staff person who provided us statewide salary data not previously available. Second, our financial data revealed how badly our salaries had deteriorated. Third, the contract proposal had been prepared by a large group of faculty which created broad-based support.

STRIKE CAUSATION

One would predict that the bargaining process which led to a strike would be characterized by conflict and strife but, ironically, the opposite was the case. The negotiation process itself was more open, objective and even friendlier than the previous several years. (I do question how complete was the information communicated to the president and the board about what transpired at the table). I attribute the improvement in the negotiations process to our utilizing objective and thorough data to support our demands rather than arguments of rightness or fairness.

The two major principles on which our salary proposal was founded became more important to most faculty than the amount of money itself. The two principles were:

1) The integrity of our salary schedule should be maintained. This required major revisions in the full- and part-time salary schedules, along with funding increments and advancements separate from the cost-of-living increases.

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2) The board and president should assume more local responsibility for faculty salaries and spend locally generated money.

In addition, three important underlying issues surfaced:

1) The faculty perceived the president as mainly concerned with pleasing the board, the legislature and the community and not concerned with faculty wants and needs.

2) The board, as one faculty member stated it, saw themselves as an extension of the administration and assumed that the administration represented the faculty; the board did not act as trustees of the community within the college but mainly expressed concern about legislative intent.

3) The faculty felt alienated from the president, board and the disfranchisement from the governance of the college.

So, while the bargaining was unusually open and objective, the depth of faculty feelings and commitment became more and more solidified. How did the sides become so polarized that a strike occurred?

Perhaps, any dramatic action such as a strike represents a polarization of positions and values. The polarization for us occurred in the following way:

1) The legislature had mandated a 3% raise for each faculty member in their 1986 Appropriations Act.

2) The faculty had taken the position that an Appropriations Act cannot legislate local bargaining.

3) The board and the president took the position that they were bound by legislative intent, regardless of the fact that they had local money available.

4) The district rejected our proposal to find creative solutions to get more money in faculty pockets (i.e. pay for optional days).

5) We rejected the district's offer that gave the full-time faculty what we wanted at the expense of the part-time faculty. The district's proposal that we "rip off" our part-time colleagues for our own self-interest, did more to anger the faculty and precipitate the strike than any other single factor.

The polarizing of positions intensified during orientation week, the week prior to the start of classes. An interesting phenomenon occurred during that week that took the association leadership by surprise. Each time we met with the faculty to report on the bargaining process and recommend actions for them to take, the members proposed more radical actions than we had recommended; they were pushing us to take a firm stand and were willing to back us with corresponding actions. As a result, the faculty boycotted the president's opening speech the first day and did informational picketing instead. In addition, we boycotted all planned activities for the week, including advising of new students. All was not right with our world and we had run out of patience.

Concurrently, with the help of our WEA staff, we had been making strike preparations with the hope and expectation that we would not have to implement them. Having reached impasse in negotiations, on the Friday evening of orientation week, the bargaining team met with the Executive Council and voted unanimously to recommend strike action. We approached the Sunday evening faculty meeting with anxiety and dread. Many faculty members had said over the years that this faculty would never go on strike. How would we save face and recoup our losses if we did not receive the kind of vote we needed to implement a work stoppage? We had decided we needed at least a 75% vote.

We presented the faculty with the board's last offer, proposed rejecting that offer and recommended a strike. Information was provided by WEA staff about what would probably happen, what could happen, and the worst possible scenarios. The vote was taken by secret ballot and it was almost unanimous; we were on strike. The emotions among the faculty that evening were of sadness, fear, and anxiety undergirded by a deep and determined anger.

A "SUCCESSFUL" STRIKE

We have been told by people who have experience with strikes that ours was successful; what is important is that we felt it was successful. The criteria that determined success for us are the following:

1) Unity: By taking vigorous action, the faculty overcame much of the fear and anxiety about going on strike. A sense of determination set in that helped create a wonderful experience of closeness, caring, and unity that grew throughout the week. All but three full-time faculty were on the picket lines, along with many part-timers. No faculty crossed the lines. The board and president over-reacted on the first day, cancelling classes and filing an injunction, which only succeeded in increasing our anger and determination.

2) Involvement: Many individual faculty were assigned or voluntarily assumed tasks that maximized the use of their particular talents. The Executive Council became the Crisis Team and made all the major decisions related to strike actions. As president, my role became one of facilitator and spokesperson.

3) Planning: The strategies recommended and the actions taken throughout the week were well-organized and appropriate both to the situation and the people.

4) External support: We received unconditional support and assistance from WEA staff, officers, and local leaders. We were surprised and pleased to receive almost uniformly positive press coverage and community support. We also received much support from inside the college from our division chairs and classified staff.

5) Reaching a compromise settlement: The strike ended and provided a win-win agreement.

6) Self-confidence: Our strike was a success because of the increased sense of self-esteem and self-confidence within faculty that resulted from asserting our principles and being willing to take the action necessary to back them.

POST-STRIKE ANALYSIS

The faculty at BCC returned to campus deeply angry at the college's president and more united than we had been in years. As association president, the decisions to be made about how to address that anger and work on resolving the issues that had emerged were more difficult than how to lead the strike. The actions we would take would have long-term positive or negative effects on the faculty's relationship with the president and the board; we could become more alienated and estranged or we could use the opportunity to utilize the increased awareness and intense feelings to constructively and creatively solve the problems.

I utilized the first board meeting to try to develop a framework for trying to deal with the unresolved issues in a positive, active way. I tried to do that by describing the bargaining process from the faculty's viewpoint; what the strike was like for us; where we were now; and lastly, what changes needed to occur so there could be positive outcomes for everyone rather than pervasive frustration and alienation. I recommended we begin to change the communication between the faculty and the president and the board by establishing monthly informal meetings between board members and faculty; that the president attend divisional meetings periodically, and that there be discussion groups with faculty, administration and board members about common issues and goals. Second, I suggested that we needed to work more collaboratively in mutually identified goals and concerns. Third, we needed to change the bargaining process to a less polarizing one. And fourth, the faculty wanted behaviors from the president and the board that indicate they are advocates for faculty needs. I also had two other faculty members speak to the board about why they chose to go on strike, what it was like for them and how they personally felt about the experience and the concerns that remained.

We have not solved all our problems but, we have made some positive changes that will set some new processes in place to more satisfactorily address those problems. The consciousness of all of us has been raised. We are all more sensitized to what can happen when avenues to deal with salaries, working conditions and decision-making are not effective or have broken down. The faculty feels more empowered, the board is more involved and seem more vitalized and definitely have been more responsive, in a sincere and consistent way, to faculty needs and wants.

Many faculty probably fear the negative environment that may result from a strike action as much as the strike itself. My belief is that some negative factors must already exist, albeit under the surface, for a strike to occur. What a strike does, in my opinion, is to bring the issues and conflicts out in the open and, therefore, provide an opportunity to resolve them. The most difficult question I was asked to speak to is the question, "How does one reconcile the image and identity issue of professionals on strike?" because that was not an issue for me or for most of our faculty. If anything, I felt it was my professional obligation to protect the rights of myself and my colleagues to impact the governance of the college, improve the morale of the faculty and, therefore, the quality of instruction.

Bargaining is a process that allows faculty to participate in decision-making, due process, and to bargain for fair working conditions and salaries. We are both employees and professionals, not either/or; we have both rights and responsibilities in our roles of institutional managers, professionals and employees. Collective bargaining ensures the rights for each role. A strike is an action to be taken only when impasse has been reached, when both sides are polarized and all their options to resolve their differences have been exhausted. To achieve our professional values, we may, at times, have to act in uncomfortable and even hurtful ways; we may have to sharpen and increase the conflict to resolve it. As you may recall, the Chinese pictogram for "crisis" includes two parts; one meaning "danger", the other meaning "opportunity". As professionals and employees, we can enter into strikes and other crises seeking the best from the opportunities they may bring.

VIII. LIFE CYCLE—STEP FOUR: RETIRING THE PROFESSOR

A. TIAA/CREF'S FACULTY PENSION PLANS

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TIAA/CREF

INTRODUCTION

Providing retirement income has historically been viewed as the combined responsibility of three entities: government, employers and employees. More specifically, Social Security, employer-sponsored pension plans, and personal savings comprise the "three-legged stool" that for a long time now has held the promise of financial security during retirement. The metaphor has been somewhat over-used and the stool may have short or wobbly legs these days, but the concept itself has formed the framework of policies concerning retiree welfare in every sector of employment — whether public or private, profit or non-profit.

The foundation was laid in 1935 with the establishment of the Social Security system and its Old Age and Survivors Income Program. Its purpose was, and still is, to provide workers with a floor of income protection to make sure that at least a minimal portion of their pre-retirement income would be replaced during retirement. Employer-sponsored pensions and personal savings would supplement this basic foundation.

Since 1942, the federal government has been involved in regulating employer-sponsored pensions through tax policy. In that year, the Internal Revenue Code incorporated general guidelines for the design and operation of pension plans, and provided certain employers with tax-favored treatment of their plans if they complied with the guidelines. The intention of most of the legislative and regulatory changes since then has been to help assure that benefits are provided by employers to employees, and to provide employees with opportunities to augment the basic retirement income provided by Social Security and pension plans by encouraging additional savings.

ERISA

Since the enactment of ERISA in 1974, government involvement in the area of pension plans has been much more pervasive and frequent. We had ADEA amendments and a Revenue Act in 1978, ERTA in 1981, TEFRA in 1982, DEFRA in 1984, REACT in 1985, the Tax Reform Act of 1986 and, most recently, OBRA and additional ADEA amendments. Also, there were significant changes to Social Security taxes and benefits in 1977 and again in 1983. The issues covered by these various pieces of legislation include rules for eligibility, the level of permissible tax-favored contributions or benefits, when and how benefits must be funded, when and how benefits may be received, rules for IRAs, and the list goes on. And there has been extensive judicial interpretation as well. Decisions rendered by the courts in some cases have revolutionized the pension (and insurance) industry. For example, decisions a few years back led to the use of unisex mortality factors in determining pension benefits.

TAX REFORM ACT OF 1986

The Tax Reform Act of 1986, more than any other piece of legislation since ERISA, has focused directly on the issue of what a retirement plan should be: a plan to provide income for employees in retirement. What will this mean for employers trying to develop and maintain plans that provide for the orderly retirement of staff members with an adequate level of benefits, and for employees trying to plan appropriately for their retirement years? It will mean an emphasis on a back-to-basics approach to retirement plan design in the areas of when to participate, when to vest, how much to contribute and for how long, and when to receive benefits.

1) 403(b) Retirement Plans

For instance, tax reform seeks to assure broad retirement plan coverage through nondiscrimination rules which will become applicable in 1989 for all 403(b) retirement plans, such as TIAA-CREF retirement plans. This means that employers will have to maintain retirement plans that treat all classes of employees equitably where eligibility, participation, and coverage are concerned if they want income taxes on contributions and earnings to be deferred until retirement for highly compensated employees. Even though it had not previously been mandated, TIAA-CREF has always recommended that eligibility be extended to all classes of employees, and that employees begin participation early in their careers because they all have the same need for a secure and adequate income during retirement. Most institutions with TIAA-CREF plans have made pension plan participation available for all classes of employees.

2) Inclusions/Exclusions

And, while the government has not yet mandated retirement plan participation, it has reduced the period of time that an employer may exclude an eligible employee from participation. The Tax Act requires that beginning in 1989, institutions with fully and immediately vested retirement plans — such as the standard TIAA-CREF plan — must make participation available no later than age 21 with two years of service, although teaching institutions may make participation available at age 26 with one year of service. Most institutions with TIAA-CREF plans make participation available immediately or after a short period of service. And to assure that adequate benefits are provided, TIAA-CREF has also recommended mandatory participation at some point during the employee's career. About two-thirds of the TIAA-CREF plans at colleges and universities require faculty to participate at some point.

3) Vesting

Tax reform has also reduced the requirements for vesting of retirement benefits for all retirement plans by providing for a minimum of full vesting after five years of service or for at least 20% vesting after 3 years of service and then increasing by increments of 20% each year until full vesting is achieved after 7 years of service. Standard TIAA-CREF retirement plans provide for full and immediate vesting of plan contributions, and so will not require change.

Other provisions of the new tax law deal with the issue of assuring that retirement plan accumulations will be used for their intended purpose — to provide a retirement income. The Tax Act achieves this by discouraging withdrawals of retirement plan accumulations before retirement. Although the Tax Act has not prohibited "early" lump-sum withdrawals from 403(b) annuities; as of January, 1987, a 10% additional tax (with a few exceptions) became applicable for withdrawals made from these plans before age 59-1/2. And beginning in 1989, the Tax Act goes a step further. It imposes restrictions that prohibit withdrawal of 403(b) accumulations attributable to salary reduction contributions from retirement savings plans before age 59-1/2, except in cases of death, disability, separation from service or hardship.

4) Retirement Income

As a result, the Tax Act has made voluntary tax-deferred annuity plans look more like retirement plans; plans that are geared to keep funds intact and provide retirement income. Any other purpose — whether by the institution to provide higher compensation to valued employees or to encourage less productive employees to retire; or by the individual to use a government tax subsidy to save more efficiently — generally will now have to be accomplished through the use of cash (and, therefore, currently taxable compensation). This means it will be more expensive to achieve the same dollar result. It makes the "quick fix", such as a retirement buy-out, more expensive — perhaps prohibitively so.

5) Mandatory Retirement

With the elimination of mandatory retirement under the new ADEA amendments, employees may continue to work indefinitely. They may defer retiring because of fears associated with retirement; fear of inflation eroding retirement income; fear of what will happen to them without the stimulus of the workplace; fear of inadequate health insurance; fear of an inadequate income, or all of the above. However, up to now faculty members have been inclined to retire earlier rather than later.

6) A Reassessment

All of the government's mandated changes will at least require that institutions step back and assess their pension plans to see that they are meeting intended objectives. In some cases, it may mean the establishment of specific objectives, such as target benefit levels as a ratio of final salary after certain periods of plan participation. It is generally held that benefits from an employer-sponsored pension plan, in combination with Social Security, should provide a retirement income of approximately two-thirds of a person's pre-retirement income, or about 75% to 85% of after-tax income. Based on a normal working career of 30 to 35 years and a retirement duration of about 20 years or more, it takes about two working years to set aside enough to provide benefits for each year of retirement, if the retirement plan has a sufficient contribution rate. A 10% of salary contribution rate is generally viewed as the minimum level needed to meet the two-thirds objective for a career of participation. The same contribution should generally be provided to all classes of employees, since all employees need adequate benefits for retirement. However, institutions may want to provide higher rates for salaries above the Social Security Wage Base (still permitted under the Tax Act) to provide comparable income replacement ratios for all levels of employees. Wth regard to public retirement systems, which are typically defined benefit plans, income levels at retirement are determined by a benefit formula rather than by a contribution rate.

INVESTMENT STRATEGIES

Investment strategies and long-term performance also play an important role in making sure participants in defined contribution plans are able to retire when it is appropriate, and that retirement plan objectives are met. TIAA-CREF's investment strategies support the long-term nature of our association with participants, which can easily span 40, 50, or more years when both the working and retired years are considered. TIAA-CREF's overriding objective is the assurance that promised benefits will be there at retirement. Both TIAA and CREF are broadly diversified pension funds dedicated to long-term investing, with risk/reward parameters appropriate for the accumulation and payout of retirement benefits. TIAA's investment objective is to achieve the highest possible rate of return on debt investments in bonds, mortgages and commercial real estate. It provides a guarantee of both principal and interest. CREF's investment objective is to achieve a favorable long-term rate of return through appreciation of capital and investment income, by investing in a broadly diversified portfolio of common stocks. This two-pronged debt and equity approach is the basis of the TIAA-CREF "fixed and variable" annuity program. And we are planning to introduce a CREF Money Market Annuity alternative later this year to provide for further diversification. The CREF Money Market investment objective will be the realization of high current income (relative to other money market instruments available) to the extent consistent with maintenance of liquidity and preservation of capital.

TIAA-CREF annuitants continue to participate in the investment experience of TIAA and CREF while they are receiving annuity income benefits. What does this continuing participation in TIAA mean in terms of retirement income? While changes in TIAA income are gradual, participants who retired 10 years ago are receiving approximately 20% more from their TIAA annuity today. CREF income is variable each year; it increases and decreases, sometimes dramatically, to reflect CREF's investment performance. Participants who can tolerate these fluctuations have benefited over the long run: CREF annuitants who were receiving, for example, $1,000 a month in CREF retirement income in May, 1977 would be receiving over $3,300 a month today, although during that period CREF income actually decreased in three years. An annuitant who began receiving $1,000 a month from CREF in 1982 would receive about $2,700 today. There is also a payment method designed to help TIAA annuitants offset the impact of inflation on their TIAA annuity income. Under the graded benefit payment method, benefits start out lower than they otherwise would, because most of the dividends that would be paid out are instead used to purchase an additional amount of lifetime annuity income for the future. This approach assists in maintaining the purchasing power of participants' annuity benefits.

A LOOK AHEAD

Today, nearly three-quarters of participants in TIAA-CREF plans are choosing to retire prior to age 65. Presumably, they would not be "retiring early" if they were uncertain about the adequacy of their retirement income. They do not stay on the job in great numbers beyond their institution's normal retirement age, and in spite of the raising of mandatory retirement age to 70 in 1979, and now with its elimination, earlier retirement has continued to be the trend among TIAA-CREF participants. This pattern could reverse itself in the future.

What does the future hold? No one can be sure, although we can count on continued legislative involvement on the part of Congress. This makes it difficult, and costly, for employer-sponsored pension plans to stay in compliance with ever changing rules and regulations on pension policy. Thus, institutions will frequently need to assess the overall design of their retirement programs to ensure that they are meeting their objectives of providing income security for retirees. Also, individual participants will have to adjust their personal retirement savings strategies to account for changes in their employers' pension plan and/or legislated changes affecting personal savings, such as those imposed by the 1986 Tax Act. As the "three-legged stool" continues to be readjusted through government intervention, we should not forget our pension plan commitment and the integral role retirement plans play in retirement security.

LIFE CYCLE—STEP FOUR:
RETIRING THE PROFESSOR

B. ALTERNATIVES TO TIAA/CREF RETIREMENT PLANS

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It's a special pleasure and privilege to be with you. Four years ago this month when I published in the Business Officers Association Monthly, an article about TIAA/CREF, they published a reply. Larry Hershberger, TIAA/CREF Vice President, told me they considered the matter closed. Well, it hasn't, as probably a number of you know, stayed closed; indeed, it's gotten more and more open. When I was writing that article, I did, as I expect many of you do often, have drafts read by some colleagues. And I was struck at how meticulously closely they read the drafts on this occasion because it took only one sentence to say what we're talking about. For most academics TIAA/CREF savings are the largest financial asset or the largest after your home.

INVESTMENT FLEXIBILITY

Over the five years since NACUBO began action in this area all of us have enjoyed a major step forward. From 1918 until six or seven years ago, academics pension systems and TIAA/CREF were synonymous. In the last few years, starting at the University of Rochester then, Johns Hopkins and now, a constantly growing number of institutions a range of choices or alternatives have been added. Individuals can now decide whether to put all of their retirement savings at TIAA/CREF or to put some or all new retirement savings at, let's say, Fidelity or Vanguard or Prudential.

When an individual does retire, and I know that none of us will ever be that age, without alternatives, the only annuity that can be bought is from TIAA/CREF on whatever terms they choose to offer. If some of the savings are at, let's say, Vanguard or Fidelity or Prudential, etc., then that individual can get any employer-approved annuity that the market is offering, which, of course, may very well be TIAA/CREF. They may be offering the most attractive. At other times, somebody else may.

Some people believe that another important advantage of alternatives is that if the employer permits it, savings can be taken out upon retirement in a lump sum, not in annuity. That question, whether to require annuization for academics, is a very large controversy, one in which, I think, all of the panel here today has almost identical views.

ADVANTAGES TO ALTERNATIVE PLANS

Why is adding alternatives such a major step forward? Employees get three benefits and all of us, whether at such an institution or not, get a fourth benefit.

1) First, flexibility. Take a group such as those in this room. Some of the people here may be nervous these days about the stock market, others might not be at all nervous about the market but might be within a very few years of retirement, while a third group, age forty or under, might very reasonably say, "Look I just don't care how much the stock market bounces around, so long as by twenty odd years from now, I've got as much savings as possible". On the other hand, that person near retirement might have the rest of his life terribly injured if, rather soon before retirement the market were to plummet or even drop significantly and he can buy incomparably less annuity income. We need flexibility income because there are different types of people. We are not all black model T's. Henry Ford offered any color you wanted as long as it was black. We also have different personal preferences in how to invest. Some may have a much higher tolerance of risk than others.

2) There's a second type of difference that's important. This involves differences in readiness to make investment decisions. I expect some of you, like me, have great difficulty deciding what to order when you're in a really good restaurant. Well, there are some people who can only barely decide how much to allocate to TIAA, and how much to CREF. There are other people who perhaps teach economics, perhaps have a hobby or just plain interest and knowledge, who very much want a substantial range of choice. These are differences that warrant allowing flexibility. In addition to that first benefit of investment flexibility, I've already noted the advantage of being able to buy the best annuity that the market offers you at the time you retire.

3) A third benefit is an unexpected, unplanned and I think, clearly a wonderful by-product. When institutions add alternatives, obviously there are meetings, communications and attention being paid to retirement savings. A great number of institutions are finding that the total amount of retirement savings is being significantly increased at their institutions simply because more people are looking into it.

4) The fourth benefit that adding alternatives brings for all of us in academe, wherever we may happen to be, wherever we might have to choose for ourselves, is competition. If we have only one provider, we get what that provider chooses to offer. From 1918, when TIAA began, until about fifteen years ago they were magnificent. They were the model pension system. In 1952, for example, when they started CREF so that we could use common stock savings toward retirement, that was not only innovative, that was literally more than a decade ahead of most of the pension industry in moving to common stock based pension savings. But early in the sevenities, which, unfortunately, is a long time ago, they went to sleep so badly that the Business Officers Association came into the act and decided something had to be done. As recently as four years ago this month, the then chairman of TIAA/CREF said no changes were planned of any sort. You had no flexibility, no alternatives, and nothing different. Nor did you have the ability to go elsewhere.

THE SYSTEM "ASLEEP"

Why did TIAA/CREF go to sleep? Two reasons: First, unlike other firms you can't get your money out, unless it's put in completely voluntarily. You can't take it out except through an annuity or by dying. Second, that means that if they're not operating well, they have no market accountability. There's no goverance accountability. I don't know how many of you are aware, certainly I was not when I started into this, that we elect each year two people to the boards. We elect a total of eight people to the boards. But the boards consist of forty, and eight out of forty is tokenism.

Now, what are the signs of being asleep. The two simplest ones are first, their unwillingness for over ten years to allow us a money market fund, even after the first fund began here in New York, by two alumni of TIAA staff. As many of you know and some of you perhaps regret, the back office operations have been so out of date that we've had these repeated postponements of the introduction of the fund. But we're finally getting it and that's a great step forward, thirty-five years after the last bit of flexibility.

The other simple symptom of the out-of-dateness is that although there are over a million of us who are participants or drawing benefits, it's only just over a year ago that they brought in an 800 telephone number.

IMPROVEMENTS IN THE SYSTEM

TIAA/CREF is waking up. Why are they waking up? Five reasons are suggested for this awakening.

- First, they have greatly improved CREF investing by essentially plugging an index in.

- Second, they have a new chairman, who is not only of great stature, I think unquestionably, but is the first outsider, either ever, or at least in more than a generation.

- The third reason involves competition. Even if we can't take away the money already there, more and more places have more and more people sending money elsewhere. For example, Hopkins. In their first year 1983, with alternatives, TIAA/CREF held on to eighty percent. That is, they immediately lost twenty percent of the dollar flow. Last year TIAA/CREF was down to sixty-one percent. Thirty-nine percent of the people are going elsewhere. It's called voting with the feet. So much for the first step. The great change has occurred outside TIAA/CREF.

- Fourth, we're in a much more varied and complicated scene. We have far greater need for advice and counseling. No single firm or person can provide counseling if that person or firm is providing anything else. Even if you trust the most honorable broker/dealer, do you think that person is the best one to advise you on how much to invest in securities that that person sells and how much to put into, let's say, insurance or real estate.

- The fifth step revolves around the need to modernize the academic pension scene. The lock-in, that is, that we cannot take our money out of TIAA/CREF except either by annuity or by dying, and not too many people are willing to die to liquify assets, is bad policy and is also illegal under trust law. Unlike other insurers, let alone mutual funds, we can't go away however much we might wish to or however much our employer might wish for us to be able to. Stanford has formally requested that its employees be able to move their money away. It's under study. It's been under study a year. The new TIAA chairman is there only since February and I hope a year from that date that it will not still be under study.

VOLUNTARY RETIREMENT SAVINGS PLANS

My last point is that in discussion of the academic retirement scene there is almost never any attention to the fact that in thirty to forty-five percent of our institutions, savings for retirement is entirely voluntary. Maybe many of you would prefer voluntary plans. I doubt that many people at this place would like to see social security voluntary but that is very different from private plans. I believe, and I'm sure that probably all of us would say, that everybody who can, should be saving for retirement. Only by reasonable savings can a decent retirement be assured. Very few people can amass enough savings if they start near retirement. There is a special reason for assuring decent income for academics and it's the reason that led Andrew Carnegie, himself, eighty-two years ago to start giving pension plans which led a decade later to the foundation of TIAA. Whatever your views on when academics ought to retire, surely we would all agree that they ought not stay in the classroom simply because they have too little retirement savings.

Even if a plan is voluntary, we're okay if almost everybody participates. In fact, of faculty over forty at colleges with voluntary plans, almost five out of six do participate. I don't know whether you think that's a high enough ratio to say we're okay or not. I expect our views would differ. Among administrators, interestingly, nine out of ten participate. They know what's going on. On the other hand, does anybody worry about the clericals and other low paid people in academe? Among that group, even over age forty, over one-third of them are not participating in retirement savings plans.

Institutions have voluntary plans either because they believe in individual choice or because they recognize that voluntary plans cost less. They cost less because the voluntary plan's terms usually provide, though it doesn't have to be this way, that if the employee puts in X percent of his pay, the employer will add something, sometimes even much more than the employees' contribution.

That brings me to a tale from Southern Methodist University, if one is allowed these days to tell tales from there. Certainly it's an impressive place apart from the recent events. I think, the most important point about saving for retirement is that far too many people do not understand retirement savings or give enough attention to it. We have to attend to it because it may be impossible for you to secure your own retirement. SMU like so many others, recently added alternatives to TIAA/CREF. The office in charge conducted a series of open meetings for faculty and staff to explain the new choices. The official in charge was very proud of what he felt was a big step forward for employees with nominal, if any, cost to the institution. SMU is one of those places where if the employee will put in, let's say, four percent of pay, the University will add, let's say six percent or seven percent of pay. After he finished the presentation at one of these open meetings, a full professor got up and said, "This is a ripoff!" Well, at first he was just surprised. Then he was angered. Then he got puzzled, and he said, "Gee, we think we're really bringing you something good. We're very proud of it. I just don't understand. How is it a rip off?" So the professor says, "Well, you say that if all participate, SMU will give me seven percent. Right?" He said, "Right. Well, you'll give me seven percent. But if I take my money to the bank, they'll give me eight." True story. Thank you.

LIFE CYCLE—STEP FOUR: RETIRING THE PROFESSOR

C. THE COMMISSION ON COLLEGE RETIREMENT'S APPROACH ON PENSION PLANS

Thomas Woodruff, President
Commission on College Retirement

INTRODUCTION

There is a new planning environment emerging for both public and private college retirement programs. We have seen the evolution of two separate tracks of public programs that have largely followed levels of benefits developed in the private sector under the ERISA legislation. Separately, we have also had the development of 403B plans, either for voluntary tax sheltered annuities or for the basic retirement plan. Over the last several years, the Commission on College Retirement (CCR) has issued a number of policy reports relating to pension plans, health plans, and retirement ages. The National Association of College and University Business Officers (NACUBO), through various committees, has also issued policy statements on TIAA/CREF, as well as alternatives to TIAA/CREF. TIAA has issued a few reports addressing some of the questions that the other reports raise. All of these taken together with some of the newer legislation has developed into, what I hope will be, a new planning process on college campuses.

CURRENT ISSUES

What then are the questions facing retirement planners today? One of them is the issue of plan coverage. Those of you in public institutions probably do not have this as an issue, although you may if you have different plans for faculty and staff and if you do not have collective bargaining units. The question of plan coverage and the level of benefits and contributions is an important issue on a number of private campuses because it is very common for a 403B plan to have different contribution levels for faculty and staff. Furthermore, a number of faculty and staff plans have voluntary participation and these are going to create very serious problems on campuses. Some very tough decisions are going to have to be made about levels of benefits. Can the institutions continue to afford 15 percent contribution plans for faculty when everyone else has to be brought into the plan?

1. Integration with Social Security

The issue of integration of retirement plans with social security will also have to be raised. The new law, as well as good policy, does not necessarily say that everyone has to receive equal contributions as a percentage of salary; they just have to make sense. They have to relate in some way with social security for a total replacement rate that accounts for the different income levels involved. The question will be do you go the simple route and maybe, what appears to be the equitable route, of putting everyone under an identical contribution plan, or do you somehow try to combine social security and your pension contributions into a total package? For those institutions that wish to continue to have separately defined contribution benefit plans for certain groups, there will be a number of hoops that you will have to jump through concerning levels of benefits, coverage, and comparability. Most of the institutions will probably find it prudent, unfortunately I think, to hire actuarial firms to conduct studies and recommend what data is needed to collect, on an ongoing basis, for participation in all of your plans. This is what happened in the private sector after ERISA and my guess is, barring unforeseen simplification of federal regulations, this kind of thing will happen again.

2. Retirement Planning

I would like to emphasize one of the other implications of not only our policy reports, but also the new tax legislation. Retirement planning needs to begin very early. The new limits that are being placed and the new restrictions on voluntary contributions, even on the basic plans themselves (for those schools that have business schools and law schools and medical schools, where faculty and staff have very high salaries), the issue of annual limits on voluntary contributions may be a very difficult one. For example, a number of faculty have deferred large scale participation in voluntary tax-sheltered annuities until fairly late in their careers. The new rules have not yet come out, but as they appear to be written in the law, they will put severe limits on certain middle to upper salary groups in colleges and universities, so that it will be more difficult to catch up for not having participated early in voluntary programs. That message needs to begin to be told early. My commission recommended that a full-blown financial planning assistance program needs to begin very early in the lives of faculty and staff; particularly those in a defined contribution environment, so that people can make rational decisions about participation in tax-sheltered annuity programs.

3. Payout Options

The commission also recommended that the current payout options that are at least widely publicized by TIAA/CREF and other annunity providers need to be expanded. Counseling for some of the annuity options, such as the graded benefit method in TIAA/CREF and similar programs by other annuity providers, is needed throughout the working careers of employees. For example, based on last year's interest rates for a participant under the graded benefit method in TIAA, a monthly income would have meant, I believe, about a 40 percent reduction of the initial benefit payment over the so-called level payment method.

I do not think it is a big surprise that very few people take the graded benefit option because people have seen blue and yellow slips and other reports throughout their careers telling them that this is what you are likely to get. As they approach retirement, they are planning on that income and have made decisions about alternative savings based on those projections. To be told at or near retirement that you can have a choice of taking a 40 percent cut and having some protection against inflation, or receive the larger amount, I do not think it is any surprise what people do. My commission recommended that constant purchasing power illustrations should be a part of the regular benefit statements that people receive throughout their working careers so that they can see what these mean. I know TIAA recently issued a booklet that, in fact, does that. It is not part of the regular benefit statement, but helps guide people on what constant purchasing power annuities might look like. That needs to be part of the basic planning, not just supplemental planning.

4. Transferability of Funds

Another issue that my commission and the NACUBO committees addressed, which we think is important to include as part of the overall replanning process in light of the legislation, is that of flexibility and investment options for those participating in tax-sheltered annuities and basic defined contribution plans. My commission recommended, as a matter of prudence, greater diversification of investment options, greater choice, and flexibility during the accumulation phase for employees participating in these plans. One difficult issue emerged after we adopted this policy; the question of what do you do with money that has already been contributed to TIAA/CREF? What if an institution decides that they would like some additional fund options, perhaps, another insurance company, or whatever? What happens to the money that has already been contributed? I am assuming, of course, and I think my commission assumed, that most institutions would wish to continue to also offer TIAA/CREF as an option. My chairman and the other lawyers on the CCR began to look at the question not only from a policy point of view, but also a legal perspective. We issued a report about a year ago entitled "Transferability of Funds Invested with TIAA/CREF". In that report, the commission recommended that the so-called "top board" of TIAA/CREF change its policy with regard to transferability and permit institutions that have amended their pension plans to include alternatives so as to permit their employees to transfer money both in and out of TIAA/CREF. Up to now, TIAA/CREF has not responded by following our recommendations, however, the new chairman has indicated that he will listen and we are still hopeful that this issue will be resolved peacefully.

The CCR did buttress its policy statement with a legal opinion that an institution that properly follows an amendment process to its plan and makes the recommendation properly, can, in fact, compel TIAA/CREF to change this practice. As most of you know who followed this issue, TIAA/CREF issued an alternative opinion that indicated that this was not the case. We now have two additional opinions that we are about to release that further buttress the commission's initial policy statement. The basic issue is this. At each of your institutions there should be a plan and a document that defines what the retirement and pension plan is and how to amend that plan. You, as either participants or as representatives of institutions, have the basic responsibility for determining the nature of the retirement and pension plan. TIAA/CREF and the other so-called "vendors" that provide fund management and other annuity services to the plans are there to serve the institutions and their employees. That is the fundamental view that the commission held, and still does hold. The key point is that we have been recommending that there be greater diversification for prudent and other reasons. These plans should remain flexible and be responsive to changing economic and financial environments.

5. Retirement Age

The other legal issue that the commission addressed is the question of retirement ages and tenure. We put out a report about 15 months ago on this issue and recently my chairman has written a paper, it is not a CCR document but a paper of his, on the issue of what the implications of the Age Discrimination in Employment Act of 1967 (ADEA) amendments are on our initial policy reports, as well as on the general issue of tenure. He does address the issue of the tenure contract and particularly focuses on the meaning of the seven-year exemption that was provided by Congress for uncapping tenure contracts. One issue I would like to raise about the ADEA amendments is the call for a five-year study to be undertaken by the National Academy of Sciences. In the words of the legislation, the purpose of the study is "...to analyze the potential consequences of the elimination of mandatory retirement in institutions of higher education". This panel is to be appointed by the National Academy of Sciences and it has a number of mandates. These include discussion and reporting on:

1) the nature of the tenure contract

2) the distinction between retirement and the expiration of tenure

3) the distinction between discharge and the expiration of tenure

4) the need for a tenure term of a fixed duration, and

5) the use of chronological age as a permitted criterion for the expiration of the tenure contract.

We feel that this forthcoming study which is supposed to be conducted with the participation of the higher education community, will provide a good opportunity for faculty, as well as institutions, to try to explicitly define the nature of tenure, retirement, and the word mandatory, which has been very loosely used over the years. It is an opportunity for the higher education community to provide Congress with a clearer picture of retirement because it is clear from the wording of the exemption that they were using some terms fairly loosely.

I would like to end my comments with one announcement. Last summer, CCR issued a report calling for improved information services and for the creation of an independent organization to provide neutral or unbiased information about plans, plan design, investment options, performance of various funds, and financial planning services. This March, NACUBO, at their board meeting, endorsed this report and called upon their pension and benefits committee to come up with a plan for NACUBO, along with some of the higher education organizations, to try to put such an organization in place. The CCR is now working with those organizations and we hope that by mid-summer, or so, we will have some announcements on the creation of such an organization.